NO. 48110-3

DIVISION II OF THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON

ARTHUR WEST,

APPELLANT

V.

PORT OF TACOMA,

RESPONDENT.

RESPONSE BRIEF OF PORT OF TACOMA

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I. RESPONDENT PORT OF TACOMA'S RESTATEMENT OF ISSUE.

Is dismissal of Public Record Act suit properly dismissed under CR 12(b), CR 56, and *Hobbs v. State,* 183 Wn.App. 925- 936,335 P.3d 1004 (2014), where Appellant filed his PRA suit prior to final agency action by the Port in response to his public records request? **YES**.

II. INTRODUCTION/RESTATEMENT OF FACTS

Relevant facts are summarized and supplemented here.

On December 4, 2007, the Port of Tacoma ("Port") received Appellant's Public Records request, received via email by Port Staff Donnie Quitugua, Executive Assistant to the Port's Executive Director. On December 4, 2007 that same day, Port Staff replied to Appellant stating Port Staffer Andy Michels would be handling request. CP 497-530.

On December 6th, Mr. Michels advised Appellant that the Port was gathering documents and that the Port expected it would be December 21, 2007 before they would be available. *Id.* On January 10 and 11, 2008, Port Legal Counsel and staff again updated Plaintiff on the status of record review and production:

> Originally, we expect to respond to your request on or before January 10th, 2008. However, the Port needs additional time to respond. We will respond incrementally as sets of responsive records are gathered, reviewed and are available for release. We currently expect to release the first batch of responsive records on or before January 17, 2007.

Exhibit 5 to *1st Dec of Andy Michels, CP 497-530.*

On 14 January 2008, despite the Port's on-going actions, Appellant filed his Public Records Act (PRA)[1] lawsuit against the Port. CP 2-5. Mr West alleges in his Complaint the following:

> 1.1 This is an action to compel disclosure of records requested from defendants regarding the proposed South Sound Logistics Center.
> 1.2Defendant have failed to respond with exemptions or disclose records and plaintiff is entitled to the relief requested.

CP 2-5.

Appellant's case was initially dismissed on January 7, 2010, due to issues not related to the PRA, and later remanded.[2] After remand, the Port filed a Motion to Dismiss on September 4, 2015. CP 1127-1135. After briefing and argument, the Court issued its Order granting dismissal on November 20, 2015.CP 432. Appellant first filed for Reconsideration CP 434-462, which was denied CP 463. Appellant appealed. CP 430.

III. ARGUMENT AND AUTHORITY

This Court should uphold the Trial Court's Dismissal pursuant to CR 12(b) and or CR 56. This is a Public Records case, where Appellant prematurely filed his public records lawsuit prior to the Port completing its final agency response action. Under the holding

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[1] Chapter 42.56 RCW
[2] See this Court's Ruling of December 11, 2015. CP 709-725.

in *Hobbs v. State,* 183 Wn.App. 925- 936,335 P.3d 1004 (2014), Appellant failed to state a cause of action upon which relief can be granted. The Trial Court properly dismissed the Complaint. This appeal should be denied.

A. Dismissal Was Appropriate Pursuant to CR 12(b)(6).

The rule of Civil Procedure 12(b) provides:

> (b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under rule 19.

A complaint can be dismissed under CR 12(b)(6) for "failure to state a claim upon which relief can be granted." Whether a CR 12(b)(6) dismissal is appropriate is a question of law. *Tenore v. AT & T Wireless Servs., 136 Wash.2d 322, 329-30, 962 P.2d 104 (1998).*

On a 12(b)(6) motion, the Court examines the pleadings to "determine whether claimant can prove any set of facts, to "determine whether claimant can prove any set of facts consistent with the complaint, which would entitle claimant to relief" *North*

Coast Enterprises Inc., v. Factoria Partnership, 94 Wn App 855, 859, 974 P2d 1257 (1999).

A dismissal for failure to state a claim under CR 12(b)(6) is appropriate when " 'it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.' " *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wash.2d 107, 120, 744 P.2d 1032, 750 P.2d 254 (1987) (*quoting Bowman v. John Doe Two,* 104 Wash.2d 181, 183, 704 P.2d 140 (1985)).

One purpose of CR 12, which permits the inclusion of all defenses in a responsive pleading, is to eliminate unnecessary delay in the conduct of an action. *Kuhlman Equipment v. Tamermatic Inc. (1981) 29 Wash.App. 419, 628 P.2d 851.*

While a court must consider any hypothetical facts when entertaining a motion to dismiss for failure to state a claim, the gravamen of a court's inquiry is whether the plaintiff's claim is legally sufficient. As this court stated in *Bravo,* a proffered hypothetical will "'defeat a CR 12(b)(6) motion *if it is legally sufficient to support plaintiff's claim.*' " *Bravo,* 125 Wash.2d at 750, 888 P.2d 147 (quoting *Halvorson,* 89 Wash.2d at 674, 574 P.2d 1190) (emphasis added). If a plaintiff's claim remains legally

insufficient even under his or her proffered hypothetical facts, dismissal pursuant to CR 12(b)(6) is appropriate. *Bravo*, 125 Wash.2d at 750, 888 P.2d 147.

A Court reviews a CR 12(b)(6) Motion under the standard of Review. A trial court's ruling on a motion to dismiss for failure to state a claim on which relief can be granted under CR 12(b)(6) is a question of law and is reviewed de novo by an appellate court. *Cutler v. Phillips Petroleum Co.,* 124 Wn.2d 749, 755, 881 P.2d 216 (1994).

B. Dismissal Was Appropriate Pursuant to CR 56.

The rule of Civil Procedure 56(c) provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The Motion for Summary Judgment below pursuant to CR 56(c) was therefore proper because the pleadings, affidavits and depositions before the trial court establish that there is no genuine issue of material fact. *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995) (quoting *Dickenson v. Edwards*, 105 Wn.2d 457, 461, 716 P.2d 814 (1986); and *Wilson v. Steinbach*, 98 Wn.2d

434, 437, 656 P.2d 1030 (1982)). All the facts submitted and the reasonable inferences there from are considered in the light most favorable to the nonmoving party. *Citizens for Clean Air v. Spokane*, 114 Wn.2d 20, 38, 785 P.2d 447 (1990).

A material fact is one on which the outcome of the litigation depends. *Braegelmann v. Snohomish County*, 53 Wn. App. 381, 383, 766 P.2d 1137, *review denied*, 112 Wn.2d 1020 (1989). The burden is on the moving party to prove there is no genuine issue of fact which could influence the trial. *Hartley v. State*, 102 Wn.2d 768, 774, 698 P.2d 77 (1985).

Issues of law are properly resolved on summary judgment. *See Harris v. Harris*, 60 Wn.App. 389, 392, 804 P.2d 1277, review denied, 116 Wn.2d 1025, 812 P.2d 103 (1991); *Maltman v. Sauer*, 84 Wn.2d 975, 530 P.2d 254 (1975)).

A Court reviews a CR 56 Summary Judgement Motion under the de novo standard of review. "'The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court.'" *Aba Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006) (quoting *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002)).

C. Appellant Failed to State a Claim for Which Relief May Be Granted Because Appellant Prematurely Filed His PRA Suit, Prior to Final Agency Action as the Port's PRA Responses Were Not Yet Complete

Denial of a request to inspect to copy public records is a prerequisite for filing an action for judicial review of an agency decision under the PRA. *Hobbs v. State,* 183 Wn. App. 925- 936,335 P.3d 1004 (2014). Copy attached as **Appendix 1.**

The PRA requires a final agency action before a suit may be brought. *See Hobbs,* 183 Wn.App. at 936.... before a requestor initiates a PRA lawsuit against an agency, there must be some agency action, or inaction, indicating that the agency will not be providing responsive records. *Hobbs,* 183 Wn. App. at 936. Thus, requestor may not initiate a lawsuit before an agency has taken some form of a final action. *Hobbs,* 183 Wn. App. at 937, ("Hobbs takes the position that a requestor is permitted to initiate a lawsuit prior to an agency's denial and closure of a public records request. **The PRA allows no such thing**. Under the PRA, a requestor may only initiate a lawsuit to compel compliance with the PRA after the agency has engaged in some final action denying access to a record").

In the present matter, Appellant file suit on January 14, 2008,

while the Port was actively gathering, and reviewing records. CP 2-5 The Port, while actively gathering and reviewing the tens of thousands of potentially responsive records and updating Appellant of that review status, did not complete its records request response until April 15, 2008.[3]

Appellant's pleadings and all affidavits before the trial court establish that there is no genuine issue of the material facts. *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995), cases cited.

First, Appellant's Motion for Show Cause admits that Appellant filed suit while the Port was responding to his request.

> I, Arthur West, certify the following to be true.
>
> On December 4, 2007, I made a public records request to the port of Tacoma for records relating to the proposed South Sound Logistics Center.
> To date the defendant has not released any records whatsoever, and <u>although they have promised to respond with records on three separate occasions</u>, each time they have failed to meet their own deadline.

CP ___.[4] Dismissal under *Hobbs* is proper pursuant to CR 12(b)(6). If a plaintiff's claim remains legally ***insufficient*** even under his or

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[3] "2. Attached is a true and correct copy of the notice sent to Petitioner Mr West at 4:57 PM advising him that as of May 1, 2008, the Port had completed its review of records responsive to his request, and that the public records and privilege logs were available to him." Dec of Lake and attachment at CP 544-549.

[4] Respondent Port files simultaneous with this Brief the Pot's Second Supplemental Designation of Clerks' Papers to add Appellant's January 14, 2007 Motion for Show Cause. Copy attached as **Appendix 2.**

her proffered hypothetical facts, dismissal pursuant to CR 12(b)(6) is appropriate. *Bravo*, 125 Wash.2d at 750, 888 P.2d 147.

Next, pleadings filed by the Port clearly establish that the Port's actions in response to the PRA request were active and ongoing at the time the Appellant filed this case. Early on in this case, the Port filed Andy Michel's (first) Declaration, which establishes the Port's ongoing responsive efforts at the time that Appellant filed suit:

> 4. **On December 4, 2007**, the Port received Petitioner West's Public Records request, received via email by Donnie Quitugua, Executive Assistant to the Port's Executive Director. **On December 4, 2007** that same day, Mr. Quitugua replied to West stating I would be handing request....
>
> 5. **On December 6,** I advised Mr West that **the Port was gathering and the Port expected it would be December 21 before they would be available**.
>
> 6. **On December 21, 2007,** I contacted Petitioner West, updating him with information that **the Port compiled some records, but technology prevented copying the records to a disk for disclosure, that the Port would be in contact shortly**.

Dec'l Michels CP 497-530, at 498. The *Michels* declaration goes on to describe a back-and-forth exchange between Port staff and West, and demonstrates that West regularly communicated about this request with the Port in the days and weeks leading up to this filing. CP 497-530.

Second, an early Court Order in this case establishes the facts

upon which dismissal per *Hobbs* should be granted. On March 28, 2015, the Court entered its first Substantive Order in this case. CP 579-581. The Order documents that while on going, the Port's processing of West's public records request was not yet final:

> "The Court rules:
>
> (1) **Show Cause of the issue of compliance is premature** at this time and reserved.
>
> (2) The Port stipulates and the Court Orders that the public records + [sic] privlidge [sic] logs for volumes identified...shall be made available by April 15, 2008.

March 28, 2008 Order[5]. CP 579-581. The Port met that deadline.[6]

Before the Trial Court, and again here on appeal, Appellant fails to dispute the centerpiece material fact which underpins the Port's dismissal Motion - that the Port's responsive efforts were ongoing but not yet final at the time he filed suit[7]. Therefore, the Port properly met its burden to show that the undisputed facts on record

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[5] The Plaintiff handwrote the Court's order, and the Court signed the Order.

[6] "When last the parties appeared, this Court entered an Order wherein the parties set an agreed schedule for disclosure for the voluminous records being gathered, reviewed, and released by the Port in response to Petitioner's broad records request. The Order's agreed schedule set two milestone dates by which the Port would make records available to Petitioner: April 15 and May 1. The Port has fully complied with Order, notifying Mr West of the first set of available records on April 15, 2008." CP 550-576, and CP 640-645.

[7] In fact, West concedes it by his declaration within his Show Cause Motion CP___. Respondent Port files simultaneous with this Brief the Pot's Second Supplemental Designation of Clerks' Papers to add Appellant's January 14, 2007 Motion for Show Cause. Copy attached as **Appendix 2**.

entitle the Port to a summary dismissal under CR 56 and *Hobbs*.[8]

In a CR 56 summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. See *LaPlante v. State,* 85 Wn.2d 154, 158, 531 P.2d 299 (1975). If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at this point, the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial", then the trial court should grant the motion. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); see also *T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 630-32 (9th Cir. 1987). In *Celotex*, the United States Supreme Court explained this result: "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." 477 U.S. at 322-23.

In making this responsive showing, the nonmoving party cannot

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[8] A material fact is one on which the outcome of the litigation depends. Braegelmann v. Snohomish County, 53 Wn. App. 381, 383, 766 P.2d 1137, review denied, 112 Wn.2d 1020 (1989). The burden is on the moving party to prove there is no genuine issue of fact which could influence the trial. *Hartley v. State*, 102 Wn.2d 768, 774, 698 P.2d 77 (1985). The Port met that burden.

rely on the allegations made in its pleadings. CR 56(e) states that the response, "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." At that point, the evidence and all reasonable inferences therefrom is considered in the light most favorable to the plaintiff, the nonmoving party. *Young v. Key Pharm., Inc.,* 112 Wn.2d 216, 770 P.2d 182 (1989). Here West presented no proof and no specific facts on thei material issue that the Port's responsive efforts were ongoing but not yet final at the time he filed suit.

Per *Hobbs*, "being denied a requested record is a prerequisite for filing an action for judicial review of an agency decision under the PRA. Although the statute does not specifically define "denial" of a public record, considering the PRA as a whole, we conclude that **a denial of public records occurs when it reasonably appears that an agency will not or will no longer provide responsive records**. ....Thus, based on the plain language of the PRA, we hold that before a requestor initiates a PRA lawsuit against an agency, there must be some agency action, or inaction, indicating that the agency will not be providing responsive records." *Id.*

Hobbs, a published Division II case, requires this lawsuit be

dismissed. The *Hobbs* Court expressly held: "Thus, based on the plain language of the PRA, **we hold** that before a requestor initiates a PRA lawsuit against an agency, there must be some agency action, or inaction, indicating that the agency will not be providing responsive records." *Hobbs*, 183 Wn.App. at 936. Emphasized.

Hobbs further establishes that when there is "no dispute that [an agency] was continuing to provide Hobbs with responsive records [at the time of the lawsuit filing]", ***no justiciable event occurs.*** 183 Wn. App at 936. Only after an agency closes a request, does a requestor have the ability to petition for judicial review. *Id.* "Thus, requestor m**ay not initiate a lawsuit before an agency has taken some form of a final action**." *Hobbs,* 183 Wn.App. at 937. Emphasis provided.

Division I also affirmed the Port's reading of *Hobbs*: "There, the agency advised Hobbs that it would produce the requested documents in installments. Hobbs filed suit immediately after the agency produced its first installment, while the request was still open and the agency was still gathering records... Division Two affirmed the dismissal of Hobbs's case...." *Cedar Grove Composting, Inc. v. City of Marysville*, 188 Wash. App. 695, 714,

354 P.3d 249, 257 (Div. 1, 2015). Thus the *Hobbs* holding unquestionably requires dismissal, when a PRA suit is prematurely filed before an agency takes final action, as was here.

The Trial Court's firm conclusion to dismiss was driven by the plain language of the PRA, RCW 42.56.550(1). As the *Hobbs* court explained:

> Under RCW 42.56.550(1), the superior court may hear a motion to show cause when a person has "been denied an opportunity to inspect or copy a public record by an agency." Therefore, being denied a requested record is a prerequisite for filing an action for judicial review of an agency decision under the PRA. Although the statute does not specifically define "denial" of a public record, considering the PRA as a whole, we conclude that a denial of public records occurs when it reasonably appears that an agency will not or will no longer provide responsive records.
>
> .... The language in RCW 42.56.520 [11] itself refers to "final agency action or final action." Thus, based on the plain language of the PRA, we hold that before a requestor initiates a PRA lawsuit against an agency, there must be some agency action, or inaction, indicating that the agency will not be providing responsive records.

Hobbs, 183 Wn.App. at 936. Here, at the time that Appellant asserted his PRA cause of action in his complaint, there was no final agency action that constituted a denial of records and, thus, formed a basis for judicial review of the Port's response. Appellant did not have a cause of action when he asserted that he did have a cause of action. The Trial Court lacked jurisdiction and properly dismissed.

Dismissal with prejudice is the proper remedy for bringing a premature PRA Claim. *See Hobbs,* 183 Wn. App. at 935, 946. Here, both Appellant's pleadings and numerous Port pleadings on record, establish that this case on all fours is indistinguishable from *Hobbs*, and accordingly was properly dismissed.

D. Appellants Arguments on Appeal Lack Merit

Appellant attempts to raise various issues to refute *Hobb's* clear application. None succeed. Each is addressed below.

1. Stare Decisis Does NOT Apply Here as Appellant Claims.

Although difficult to logically follow, Appellant apparently argues that prior rulings in this (and other cases) can rise to somehow confer jurisdiction on a Court, where otherwise it is lacking.[9] Similarly Appellant repeats this argument, when he claims "West and three (3) Appellate Courts had reasonably and justifiably relied upon prior law and practice". [10] Appellant is wrong. Stare decisis does not apply here as Appellant claims.

Stare decisis means, literally, "to stand by things decided." BLACK'S LAW DICTIONARY 1443 (8th ed. 2004). This cornerstone of the common law assures that citizens can rely on the rule of law in

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[9] Section I, *App Opening Brief* at 23-25.
[10] Section I, *App Opening Brief* at 25.

decision making. By virtue of stare decisis, courts follow holdings laid down in previous judicial decisions unless they contravene principles of justice. *See Windust v. Dep't of Labor & Indus.*, 52 Wn.2d 33, 35-36, 323 P.2d 241 (1958).

Applicability of doctrine of stare decisis here turns on whether the Port's dismissal Motion presents any argument that touches and concerns determinations made by the appellate court previously in this case.[11] The record shows it does not. The Trial Court previously dismissed the case, not based on PRA issues, but instead as an exercise of the Trial Court's inherent power to manage schedules and litigants before it[12]. In the first appeal, this Appellate Court expressly did **not** rule on any Public Records Act issues.

The Appellate Opinion, docketed in this case on December 11, 2014, contains a factual recitation, a section analyzing the applicability of CR 41, and a section analyzing the trial court's inherent power to dismiss a case. CP 709-725. Significantly, no holding in the Opinion touches in any way on substantive review of any PRA issues. Copy attached as **Appendix 3.**

Appellant did raise issues in his first appeal related to PRA Show

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[11] CP 709-725; this Court's prior appellate ruling.
[12] "The trial court's January 25 order of dismissal relied solely on CR 41 (b)(l)- and 2." CP 709-725 at 713.

Cause hearings – but this Appellate Court ruled that those issues were not properly before them. [13] Appellant repeats his improper request for review of show cause decisions in this present appeal.[14] Therefore, stare decisis, to the extent it applies at all, can only apply to (1) the very narrow issues of the applicability of CR 41 and the scope of a trial court's inherent power to dismiss this case as a sanction for the Plaintiff's prior litigation practices, and (2) the Appellant's repeated request for review of PRA show cause decisions in this present appeal.

The CR 41 issues are not present here. At bar is the Port's Motion to Dismiss for lack of justiciable issues at the time Plaintiff filed his premature PRA case. This PRA dismiss motion is far outside the scope of the prior Appellate opinion in this case. With the exception of the Appellant's repeated request for review of PRA show cause decisions in this present appeal, the doctrine of stare decisis simply does not apply to the Port's dismissal motion here, because there has been no previous appellate ruling on this issue.

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[13] West raised issues related to PRA Show Cause hearings – but this Court ruled that those issues were not properly before the Court. "Here, West' s second notice of appeal sought review of the order of dismissal and " all interlocutory orders," apparently including the decisions on West' s show cause motions. CP at 662. But a notice of appeal is not a proper method of seeking review of these decisions because they are not appealable as a matter of right. *Chubb*, 112 Wn.2d at 721; *Meadow Park*, 54 Wn. App. at 372." CP 709-725, at 723.

[14] See *Appellant Opening Brief at* Section VII at 44, and Port's response herein at Section III.D.6 & 7.

2. The Port is Not Estopped from Dismissal Based on *Hobbs*.

Hobbs establishes with certainty that a PRA review filing is premature when the agency has not yet closed its request. The Port is not estopped under any legal standard from raising the defense under *Hobbs*, as Appellant argues.[15] Nor did the Port "expressly waive" the grounds articulated by *Hobbs* for dismissing the case, as Appellant claims.[16]

"Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wash. App. 222, 224-25, 108 P.3d 147 (Div. 1, 2005).

Appellant wrongly infers that "defendant's counsel has been dilatory in asserting the defense." [17] But the record below belies this assertion. Here, the Port has maintained, from their very first pleadings in this case (February 2008) that the lawsuit was premature:

Plaintiff's action is both premature and improper. The Port is

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[15] *Appellant Opening Brief at Section* III, 27-31.
[16] Id.
[17] *Appellant Opening Brief at Section* III, 31.

properly complying with all disclosure requirements pursuant to the Public Records Act, Chapter RCW 42.17 RCW.

The Court should find that Public Records Act allows reasonable time to comply, acknowledge the Ports efforts to date as reasonable, and strike the Show Cause matter without prejudice, preserving the Petitioner's ability to re-note the matter at a later time, if he remains dissatisfied, after the Port has been allowed reasonable to time respond to the request, as the Act provides.

CP 468-496 at 468-9.

Despite the Port's diligent efforts, the Plaintiff has rushed to the Courthouse seeking a Show Cause Order requiring the Port to produce the records. The Port is doing exactly that, but cannot instantly comply given the vast scope of Plaintiff's request.

The Public Records Act grants agencies reasonable time to gather, review and produce requested records. See RCW 42.17.320. The Port has regularly apprised Mr West of its record gathering efforts. The Port also has made records available to Mr West incrementally, as batches are gathered reviewed and found to be responsive. *Plaintiff's Show Cause action is premature* - and is counter productive to disclosure, as it diverts Port resources from complying with his massive request, to defending this hasty lawsuit.

CP 468-496 at 469-70.

Further, the Port's Answer preserved the dismissal issues:

5.4 Plaintiff fails to state a claim upon which relief can be granted.
5.5. Plaintiff has failed, in whole or in part, to satisfy the jurisdictional requirements of the asserted claims.
***
5.7. Plaintiff's claims are barred by lack of subject matter jurisdiction.
***
5.10. Plaintiff's claims against the Port are not well grounded in law or fact, are brought to harass and annoy public officials and are entirely frivolous under CR 11 and RCW 4.84.185.

CP at 736-741, at 741. Thus this case contains numerous additional references to the Appellant's "premature" filing. *Id.* Therefore, since the Port pointed out in the beginning, and maintained throughout, that Appellant's lawsuit was premature, the Port is in no way estopped from re-asserting this same position in its dismissal motion.

Further, *Hobbs* and its closely related case of *Cedar Grove*[18] were decided in 2014 and 2015 respectively. The Port promptly filed its Motion to Dismiss in reliance on these ruling in 2015. CP 319-324.

3. The Trial Court Explicitly Found the Port's Response Was Not Untimely, that the Port was Actively producing Records; *Violante* doesn't Apply to Distinguish this Case From Hobbs.

Contrary to Appellant's arguments[19], the Trial Court explicitly found the Port's response to Appellant's records request was reasonable and timely and that the Port was actively producing records. Further, *Violante* doesn't apply to distinguish this case from *Hobbs*.

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[18] *Cedar Grove Composting, Inc. v. City of Marysville*, 188 Wash. App. 695, 714, 354 P.3d 249, 257 (Div. 1, 2015).

[19] *Appellant Opening Brief, Section* IV, pp 33-34, *Section* V, pp 34-37, and *Section VI,* 46-47.

A. Port was actively Producing Records.

Appellant concedes that "Hobbs, that counsel attempts to cite as precedent, is limited to situations where an agency is still responding to a request..."[20] Here, when Appellant filed his lawsuit, it is undisputed that the Port was "still responding". Thus, according to Appellant's own characterization of *Hobbs*, dismissal is proper.

Here the record shows that Appellant's records request generated a massive volume of potentially responsive records:

- "Petitioner has submitted a massive public records request. The Port is actively gathering, reviewing and releasing records responsive to his request, which to date has generated tens of thousands of pages of possible responsive records. Plaintiff seeks unrealistic, accelerated disclosure, which ignores the huge effort required to gather, review, and respond to his request". CP 468-496, at 468. And see CP 544-549, and also CP 532-543 (background on the South Sound Logistic Project which was the subject of the records request) and CP 694-701.

- "In response to Mr West's broad records request, the Port had gathered 47 volumes (3 inch binders) of records responsive to Petitioner's request. This consist of 19 volumes of various documents (8, 602 pages) and 28 volumes of emails (10,336 pages)" CP 544-549, at 545.

- "The Petitioner submitted a broad Public Records Request, wherein he seeks:
    - All records and communications concerning the South Sound Logistics Center, from January 1, 2005 to present.

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[20] *Appellant Opening Brief,* at 37.

- All correspondence or communication with Diane Sontag.
- Any records related to potential transport of Uranium Hexaflouride through Thurston County or the SSLC.

The South Sound Logistics Center (SSLC), the centerpiece of the records request, refers to the joint planning process undertaken by the Ports of Tacoma & Olympia to evaluate an integrated cargo handling and transportation facility that facilitates the movement of freight from one mode of transport to another at a terminal specifically designed for that purpose. The SSLC is an intensive project. Plaintiff's public record request is broad, requesting "all records associated with the Project. The request has generated a massive records search by the Port of Tacoma, which is working diligently to comply. The Project is a large, complex undertaking, and has generated tens of thousands of pages of records which the Port is in the process of producing. CP 468-496, at 469-70.

And, the record shows steps undertaken by the Port to actively respond to Appellant's request:

- 9. As Port Staff worked on gathering records, it was becoming clear that the shear volume of records and the required review process would require additional time to respond to Mr West. The steps being undertaken by the Port consisted of:
  1. Notifying all Port Staff of the Record request,
  2. Compiling and organizing multiple Staff & Consultant responses,
  3. Obtaining the technology to identify and pull all subject related emails from the Port's server,
  4. Copying and "Bates-numbering" stamping the tens of thousands of pages of documents and emails responsive to the request,
  5. Undergoing in-house Staff review of the records for responsiveness and completeness,

6. Notification of Affected Parties,[21]
7. Legal Counsel's review of the records for compliance with State public disclosure requirements, and

8. Creation of a "Privilege Log" identifying records exempt from release pursuant to public record Act exemptions and explaining the exemption. This step is time intensive.
1st Dec of Port Staff Michaels CP 497-530, at 498-99.

- 11. On January 2, 2008, the Port enlisted the aid of Sound Legal Technologies, a firm specializing in data production, organization and copying to down load Port computer files of responsive records, organize the records by chronological order, and number the records for tracking purposes.
1st Dec of Port Staff Michaels CP 497-530, at 501.

- 11. In addition to my staff time and that of Legal Counsel, the Port has assigned an additional employee to the records task. That employee devotes 5-6 hours per day to the record gathering, review and processing task, to comply with Mr West's request.

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[21] "For example, certain records related to the SSLC were the subject of confidentiality agreements, prompting the Port to notify the affected party of the request, such as records of Burlington Northern Rail Road. The Port notified the Railroad of the request, and subsequently, BNSF ok'ed the release:

> As per my earlier phone message to you, the Port of Tacoma has received a Public Records / Freedom of Information Act request for documents related to the South Sound Logistics Center project. Included in this discovery process were a BNSF Northwest Timetable, a BNSF Track Chart for the Lakewood Subdivision and a BNSF Track Chart for the Seattle Subdivision.
>
> It appears these documents may be subject to a confidentiality agreement between the Port of Tacoma and BNSF. As such, we are temporarily withholding the documents.
>
> The Port is requesting that BNSF notify us by February 1st, 2008 whether or not to proceed with the release of these records. If it is the preference of BNSF that these records not be released, please contact me so that we may discuss additional options."

Exhibit 3 to 1st Dec of Michaels. CP 497-530.

12. The Port also has hired a Public Records manager, to over see such tasks.
2nd Dec of Port Staff Michaels CP 544-549.

Last, the record shows Appellant was regularly kept informed of the Port's actions in responding to the request, before, up to and after he chose to file the premature lawsuit:

- The Port has regularly apprised Mr West of its record gathering efforts. The Port also has made records available to Mr West incrementally, as batches are gathered reviewed and found to be responsive. Cp 468-496 at 469-70.

- 4. On December 4, 2007, the Port received Petitioner West's Public Records request, received via email by Donnie Quitugua , Executive Assistant to the Port's Executive Director. On December 4, 2007 that same day, Mr Quitugua replied to West stating I would be handling request. Exhibit 1.
  5. On December 6th, I advised Mr West that the Port was gathering documents and that the Port expected it would be December 21 before they would be available.
  6. On December 21, 2007, I contacted Petitioner West, updating him with information that the Port had compiled some records, but technology prevented copying the records to a disk for disclosure, and that the Port would be in contact shortly[22]. Exhibit 2.
  7. On December 26, 2007, Petitioner West requested information regarding the Port's "privilege log".
  8. On December 26, 2007, Mr Michaels replied asking for more information, and Mr West replied that same day.
  ***

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[22] On Dec 21, 2007 3:37 PM, I wrote:
"Mr. West – I anticipated sending you computer disks of SSLC documents today to respond to your request. Due to the volume of documents I encountered unexpected difficulties in loading the documents to disks. I am continuing to work this problem and expect to respond with an initial set of documents shortly. Rather than wait for complete collection and review, I anticipate multiple distributions to you given the number of documents and the time required to review. " CP

10. Therefore, on December 31, 2007, I notified Mr West that additional time was needed:

> This acknowledges your Public Record request and confirms the Port's prior communications to you in response. Please know that due to broad scope of your request and the large volume of records which may be responsive, the Port will require additional time to gather, review records and respond. We expect to respond to your request on or before January 10th, 2008.

Exhibit 4.

11. On January 2, 2008, the Port enlisted the aid of Sound Legal Technologies, a firm specializing in data production, organization and copying to down load Port computer files of responsive records, organize the records by chronological order, and number the records for tracking purposes.

12. The Port began their services with the responsive documents, to be followed by processing of the Ports responsive emails.

13. On January 10 and 11, 2008, Port Legal Counsel and staff again updated Petitioner on the status of record review and production.

> Originally, we expect to respond to your request on or before January 10th, 2008. However, the Port needs additional time to respond. We will respond incrementally as sets of responsive records are gathered, reviewed and are available for release. We currently expect to release the first batch of responsive records on or before January 17, 2007.

Exhibit 5, Emails to Petitioner.

14. There were some challenges between the Port's server hard ware and Sound Legal's technology. However, a complete copy of the responsive documents were produced by Sound Legal and delivered to the Port on January 16, 2008, followed by the Port's receipt of the emails on January 22, 2008.

15. At this point, the Port had gathered 47 volumes (3 inch binders) of records responsive to Petitioner's request. This consist of 19 volumes of various documents (8, 602 pages) and 28 volumes of emails (10,336 pages)
16. On 14 January 2008, despite the Port's on-going actions, Petitioner filed this Lawsuit.
1st Dec of Micheals CP 497-530, at 497-453, and exhibits attached thereto.

There can be no clearer affirmation that the Port was actively responding and timely in its response than the Trial Court's March 28, 2015 Order in this case. CP 579-581. The Order documents that while on going, the Port's processing of West's public records request was not yet final, and the Court endorsed the Port's proposed schedule for release of records was reasonable:

"The Court rules:

(1) **Show Cause of the issue of compliance is premature** at this time and reserved.
(2) The Port stipulates and the Court Orders that the public records + [sic] privlidge [sic] logs for volumes identified...shall be made available by April 15, 2008.

March 28, 2008 Order[23]. CP 579-581. And, the Port met that records release deadline. [24]

B. *Violante* doesn't apply to distinguish this case

[23] The Plaintiff handwrote the Court's order, and the Court signed the Order.
[24] "When last the parties appeared, this Court entered an Order wherein the parties set an agreed schedule for disclosure for the voluminous records being gathered, reviewed, and released by the Port in response to Petitioner's broad records request. The Order's agreed schedule set two milestone dates by which the Port would make records available to Petitioner: April 15 and May 1. The Port has fully complied with Order, notifying Mr West of the first set of available records on April 15, 2008." CP 550-576, and CP 640-645.

from Hobbs.

Appellant unpersuasively cites to the *Violante* case to argue that the facts of this case are distinguishable from *Hobbs*.[25] There are several significant differences.

First, the 2002 *Violante* case predates 2014 *Hobbs* by a dozen years. Second, in *Violante*, the Court based its holding on findings that: "the likelihood of a timely response was obviously nil, and there was nothing to indicate the [requestor's] request would ever be honored. Viewed objectively from the [requestor's] point of view, this lawsuit was reasonably regarded as necessary." *Violante v. King County Fire Dist. No. 20,* 114 Wn. App. 565, 571, 59 P.3d 109 (2002).

Here, the record below firmly establishes (1) the huge number of records potentially responsive to the request, (2) the Port's substantial and on-going actions undertaken in response to Appellant's mammoth records request, and (3) the Port's constant notifications to Appellant of the status of the Port's response. "Viewed objectively," it is not flatly not true that "there was nothing to indicate the [requestor's] request would ever be honored," as in *Violante*.

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[25] *Appellant Opening Brief,* at 37.

Appellant's reliance on *Violante* is further flawed in that the *Violante* court was concerned with an agency that tried to excuse its (complete) non-responsiveness on the basis that the requester had other means of access to the documents. *Violante* does not suggest that an agency's failure to meet its own estimated date of production automatically violates the Public Records Act.

A more useful precedent is *West v. Department of Licensing*, 182 Wn. App. 500, 331 P.3d 72, *review denied*, 181 Wn.2d 1027, 339 P.3d 634 (2014), where this same Appellant West alleged that the Department had violated the Public Records Act by failing to reasonably search for, identify, and produce records related to motor vehicle fuel tax payments to Indian tribes. The Department responded in installments and not always within its estimates of time needed. After nine months, the Department had delivered almost 50,000 pages and still had as many as 10,000 pages to review.[26] The trial court entered summary judgment for the Department. The Appeals Court affirmed, recognizing that when a request for records is broad in scope and the number of responsive records is substantial, an agency must be allowed time to review the

[26] This compares precisely to the Port's production of 47 volumes (3 inch binders) of records responsive to Petitioner's request. This consist of 19 volumes of various documents (8, 602 pages) and 28 volumes of emails (10,336 pages)" CP 544-549, at 545.

records "to determine whether they were responsive and whether they should be produced, disclosed, redacted, or withheld." *West*, 182 WnApp. at 512. See also *Andrews v. Wash. State Patrol,* 183 Wn. App. 644, 334 P.3d 94, 2014, (" The statute simply requires an agency to provide a "reasonable" estimate, not a precise or exact estimate, recognizing that agencies may need more time than initially anticipated to locate the requested records. RCW 42.56.520").

Violante does not apply here. The facts in this case are on all fours and undistinguishable from *Hobbs*. The *Hobbs* holding unquestionably requires dismissal, when a PRA suit is prematurely filed before an agency takes final action, as was here.

4. Rule of Law & NOT DICTA in *Hobbs v. State*, 183 Wash. App. 925, 335 P.3d 1004 (Div. 2, 2014), Holds Dismissal Proper When PRA Suit is Prematurely Filed.

Contrary to Appellant's claims[27], the Port does not rely on dicta. The holding in *Hobbs* requires that this lawsuit be dismissed.

Appellant filed this case while the Port's responsive efforts to his public records request were ongoing. The *Hobbs* Court expressly held: "Thus, based on the plain language of the PRA, **we hold** that before a requestor initiates a PRA lawsuit against an agency, there

[27] *Appellant Opening Brief,* Section VI at 37-42.

must be some agency action, or inaction, indicating that the agency will **not** be providing responsive records." *Hobbs*, 183 Wn. App. at 936. *Emphasized.* This plain language of *Hobbs* disposes of the Plaintiff's centerpiece assertions that *Hobbs'* timing-of-suit requirements are "dicta". *Id.* A statement is dicta when it is not necessary to the court's decision in a case. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 8-9, 977 P.2d 570 (1999).

Hobbs further establishes that when there is "no dispute" that an agency was continuing to respond to a public record, ***no justiciable event occurs.*** 183 Wn. App at 936. Only after an agency closes a request, does a requestor have the ability to petition for judicial review. *Id.* "Thus, requestor may not initiate a lawsuit before an agency has taken some form of a final action." *Hobbs,* 183 Wn.App. at 937. ("Hobbs takes the position that a requestor is permitted to initiate a lawsuit prior to an agency's denial and closure of a public records request. The PRA allows no such thing").

Under the PRA, a requestor may only initiate a lawsuit to compel compliance with the PRA after the agency has engaged in some final action denying access to a record"). Emphasis provided.

> ...being denied a requested record is a prerequisite for filing an action for judicial review of an agency decision under the PRA. Although the statute does not specifically define "denial" of a public record, considering the PRA as a whole, we conclude that

> a denial of public records occurs when it reasonably appears that an agency will not or will no longer provide responsive records.
>
> .... The language in RCW 42.56.520 [11] itself refers to "final agency action or final action." Thus, based on the plain language of the PRA, we hold that before a requestor initiates a PRA lawsuit against an agency, there must be some agency action, or inaction, indicating that the agency will not be providing responsive records.

Hobbs, 183 Wn.App. at 936.

If the *Hobb's* ruling were not clear enough, Division I **also** affirmed the Port's reading of *Hobbs*: "There, the agency advised Hobbs that it would produce the requested documents in installments. Hobbs filed suit immediately after the agency produced its first installment, while the request was still open and the agency was still gathering records... Division Two affirmed the dismissal of Hobbs's case...." *Cedar Grove Composting, Inc. v. City of Marysville*, 188 Wash. App. 695, 714, 354 P.3d 249, 257 (Div. 1, 2015).

Thus both the *Hobbs* and the *Cedar Grove's* holdings unquestionably require dismissal, when a PRA suit is prematurely filed before an agency takes final action, as was here.

5. Dismissal based on *Hobbs* is not a Due Process Violation As Appellant Claims[28].

Hobbs relies upon the plain language of the PRA for the

[28] *Appellant Opening Brief,* Section VI at 37-42.

proposition that judicial review of an open PRA request is "premature". *Hobbs*, 183 Wn.App. 925, citing to RCW 42.56.520. Since the "plain language" of the statute at issue has not changed at any time relevant to this action[29], Appellant suffered no due process violation by the Court applying *Hobbs*.[30]

Appellant's reliance[31] upon *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 50 S. Ct. 451, 74 L. Ed. 1107 (1930) (hereafter "*Hill*") is grossly misplaced. Copy attached as **Appendix 3.** That out-of-state case found violation of the United States Constitution's Due Process Clause on very different facts than those presented here. In summary, Missouri's State Supreme Court violated taxpayer's due process rights when that court totally abrogated a taxpayer's remedy by requiring, in contravention of that Court's clear precedent existing at the time of filing, the taxpayer engage in various administrative procedures prior to filing suit, which would have been untimely as of the ruling. *Hill*, 821 U.S. at 676. In 1922, the Missouri Supreme Court had denied in the strongest terms a mandamus petition by a similarly situated taxpayer who sought

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[29]The legislature re-codified RCW 42.17.320 to RCW 42.56.520. There have been no substantive changes to RCW 42.17.320/42.56.520. The Port relied upon 42.17.320, *supra*, at the time the Plaintiff filed this case. *Hobbs* cites to 42.56.520 as basis for its ruling. 183 Wn.App at 925.

[30] *Appellant Opening Brief*, at 42.

[31]*Appellant Opening Brief*, at 41.

administrative relief that the Missouri Supreme Court later required in *Hill*: "The [Missouri] Supreme Court denied the petition, saying that it was 'preposterous' and 'unthinkable' that the statute conferred such power on the commission." *Hill*, 281 U.S. at 676; *citing Laclede Land & Improvement Co. v. State Tax Commission,* 295 Mo. 298, 243 S. W. 887 (1922). Then, in 1927, Missouri's Supreme Court reversed course, and required, for the first time, the taxpayer to follow the previously "unthinkable" and "preposterous" procedures. This was found to be a due process violation because Missouri got to profit from its ***reversed stance*** and ruling by keeping the taxpayer's money without providing any form of hearing. "The state court refused to hear the Plaintiff's complaint and denied it relief, ***not because of lack of power or because of any demerit in the complaint,*** but because, assuming power and merit, the plaintiff did not first seek an administrative remedy which, in fact was never available and which is not now open to it." *Hill* at 454. That was a far different situation than here.

Here, from the outset, the Port correctly pointed out and preserved the proper interpretation of the plain language of the PRA, which has ***stayed consistent throughout,*** and which

renders this premature lawsuit defective:

> .... The language in RCW 42.56.520 [11] itself refers to "final agency action or final action." Thus, based on the plain language of the PRA, we hold that before a requestor initiates a PRA lawsuit against an agency, there must be some agency action, or inaction, indicating that the agency will not be providing responsive records.

Hobbs, 183 Wn.App. at 936.

Even assuming purely *arguendo* that Appellant had a "property interest" arising from the Port's records response, this is not a case where any asserted Court rulings were reversed. Rather, it **is** a case where dismissal is based on a ***"demerit in the complaint"*** which element was missing in *Hill*. Here, Appellant misused and misapplied the available procedures, filing his law suit far too early and before a valid PRA cause of action had accrued.[32] Therefore, *Hill* is totally distinguishable and does not support Appellant's claimed due process violation in any way.

To the extent that Appellant argues that *Hill* prohibits application of *Hobbs* as after-adopted judicial interpretation of

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[32] Mr West's premature filing action here is not unlike his hasty action which also resulted in dismissal in *West v. Washington State Association of District And Municipal, Court Judges, a state agency, and the State of Washington*, affirmed by Ruling dated November 2, 2015 in Appeals Court No. 72337-5-1:

> "West did not timely give the prerequisite notices before commencing this action. He cannot avoid the obligation of giving the required notices by styling his action as one for declaratory judgment rather than as a citizen action under RCW 42.17A.765(4)... **Because West failed to comply with the statutory procedures, he lacked authority to sue for a judgment that the Association's activities violate the restrictions on agency lobbying.**"

statute, *Hill* plainly forecloses West's interpretation:

> It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that this court's power to review decisions of state courts is limited to their decisions on federal questions; **and that the mere fact that a state court** has rendered an erroneous decision on a question of state law, or **has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this court.**

Hill, 281 U.S. at 680. Emphasized. Here, Appellant misapplied *Hill*. The quotation provided by Appellant[33]:

> When a state court overrules **established precedent** with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law "in its primary sense of an opportunity to be heard and to defend [his] substantive right."

concerns when a state court (1) reverses course and (2) denies a litigant a property right (in *Hill*, the State of Missouri's Supreme Court ruled that the State could retain tax monies paid under protest by enacting wholly new procedures in dereliction of the Court's own, recently, clearly established common law) and then totally abrogated all manner of judicial review.

Here, (1) no principle, nor doctrine, was reversed, because the PRA language requiring final agency action prior to seeking relief has remained consistent; the law never gave the Appellant the right

[33] *Appellant Opening Brief* at 41.

to ***prematurely*** seek judicial review of an on-going records response, at any time, and (2) the Appellant was not deprived any property. Therefore, the Appellant's reliance on *Hill* to support a due process claim is wholly misguided.[34]

Appellant's premature filing action here is not unlike his hasty action which also resulted in dismissal in *West v. Washington State Association of District And Municipal, Court Judges, a state agency, and the State of Washington*, affirmed by Ruling dated November 2, 2015 in Appeals Court No. 72337-5-1:

> "West did not timely give the prerequisite notices before commencing this action. He cannot avoid the obligation of giving the required notices by styling his action as one for declaratory judgment rather than as a citizen action under RCW 42.17A.765(4)... **Because West failed to comply with the statutory procedures, he lacked authority to sue for a judgment that the Association's activities violate the restrictions on agency lobbying.**"

6. Court Did Not Err in Failing to Amend Complaint[35] As the PRA One Year Statute of Limitation Has Passed & Any Amendment Would Have Been Futile.

A. Appellant Failed to Support His Claim of Motion to Amend.

Appellant fails to support his claim of filing a Motion to Amend

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[34] *Hill* expressly recognizes that even if *arguendo* the Plaintiff's arguments were correct and *Hobbs* departed from precedent, the dismissal of this case still satisfies the due process clause.

[35] *Appellant Opening Brief,* Section VII at 42-45.

with a citation to the record.[36] The Court should disregard.[37]

B. One Year Statute of Limitation Has Passed

In claiming that he should have been allowed to amend his Complaint, Appellant concedes his present Complaint is defective, and therefore attempts to rely on an untimely and inappropriate cure by seeking to "amend" his complaint. Appellant disingenuously claims that any such amendment would not add any substantive claims.[38] What Appellant leaves out however, is that the statute of limitations for his PRA cause of action has long ago expired. Thus his claimed "amendment to Complaint" would actually be an improper attempt to revive a claim that is no longer justiciable because the statute of limitations has passed.

In 2005, (pre-dating Appellant's suit), the Washington Legislature amended the Public Records Act to shorten the statute of limitations from five years to one year. See Laws of 2005, ch. 483, § 5; former RCW 42.17.410. Actions for judicial review under

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[36] "On June 12 Appellant moved to Amend the Complaint. This was denied." *Appellant Opening Brief,* Section VII at 42.

[37] Where party fails to cite to the record to support a contention , the court will not review matters for which the record was inadequate. *Mitchell v. Wash. State Inst. of Pub. Policy*, 153 Wn. App. 803, 225 P.3d 280 (2009).

[38] "Under this precedent, the Trial Court abused its discretion in denying plaintiff West's request for leave to amend the Complaint. This is particularly glaring in this case where the plaintiff's amendments were not to add any substantive claims that the Port had not been aware of and resisting for 7 years and such an amendment would not prejudice the Port as it would not add any substantive claims, and would certainly be in the interest of justice." *Appellant Opening Brief,* Section VII at 43.

RCW 42.56.550 now "must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis." RCW 42.56.550(6). See also *Johnson v. State Department of Corrections*, 164 Wn.App. 769 (2011) and *Bartz v. State Department of Corrections Public Disclosure Unit*, 173 Wn.App. 522 (2013), *review denied*, 177 Wn.2d 1024 (2013).

Here, the Port after the Port initially completed its response to Appellant in May 2008, the Port revisited its claim of exemption based on the Port's abandonment of the South Sound Logistics Project.[39] With this change of policy direction, the Port determined that further release of records previously deemed exempt was now warranted. *Id.* This the last date of the Port's incremental release of responsive records to this request was October 14, 2008. The one

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[39]" 3. The Port of Tacoma recently re-visited its review of the records responsive to Mr West's public records request.
4. The review was motivated entirely by the Port's change of direction for the Maytown (South Sound Logistics Center) (SSLC) site.
5. Given that the Port has abandoned plans to further investigate feasibility and re-development of the site, and now plans to sell the site, Port Staff underwent a comprehensive review of records previously deemed exempt.
6. With this change of policy direction, the Port has determined that further release of records previously deemed exempt is now warranted.
7. The sole records now exempt are (1) attorney client, (2) draft documents for which no final action was taken, and (3) records containing sensitive revenue information the release of which would injure the public interest of the Port to facilitate economic development and place private interests at a negotiating advantage.
8. Mr West has been advised that new privilege logs are available, that the released records are available electronically; and that the redacted records are available in hard copy form." Dec of Wolfe at CP 702, 706, and see Dec of Counsel at CP 707-8.

year statute of limitations from the Port's last production of a record on a partial or installment basis thus passed on October 15, 2009. In 2015, Appellant no longer had a cause of action because the limitation time period had passed.

A finding that any Appellant motion to "amend" is barred by the passage the limitation time period is no hardship on Appellant, unless self -created. It must be remembered that, "for 16 months following submission of the special master's [September 16, 2009] letter, West did not file any motions or other pleadings in the case.2 Instead, according to his own brief, West commenced " flailing around" by attempting to press his public records request in other fora.[40] CP 709-724, at 713.

Further, correctly applying *Hobbs,* Mr West at no time had a valid Complaint to amend. The Court lacks jurisdiction to take any action other than to dismiss, because West's Complaint was

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[40] Specifically, West (1) asked the Pierce County prosecuting attorney to declare that the trial judge had forfeited his office by failing to issue a timely determination in this case; (2) filed a complaint in the superior court under a new cause number " for negligence, mandamus, quo warranto, and disclosure of public records," CP at 1235; and (3) filed an action in federal district court alleging numerous constitutional claims premised on his allegation that the Port and its counsel turned West' s public records request into a " private criminal prosecution" against him, CP at 1243. Similarly, before the special master filed his report, West also (4) filed a bar grievance alleging that the Port' s counsel was inadequately supervised by a partner in her law firm; and (5) wrote to state and federal prosecutors, including the United States attorney general, requesting a criminal investigation of a conspiracy to deprive West of his civil rights and right to inspect the Port' s records. CP 709-724, at 714.

premature. *Hobbs*,183 Wn.App at 936. (Where agency is continuing to respond to a public records request,, and compliant files suit, ***no justiciable event occurs.)*** Here, Appellant cannot append any new cause of action to his defective Complaint, since the time to properly initiate the claim he now seeks (PRR violation allegedly based on October 14 2008 Port last incremental release) has passed its one year limitation date.

C. Amendment is Futile, As Limitation Deadline Has Passed.

Changes in pleadings designed to add facts occurring after the filing of the original complaint technically should be made pursuant to Wash. Super. Ct. Civ. R. 15(d), in a motion to serve a supplemental pleading, **not** pursuant to Wash. Super. Ct. Civ. R. 15(a), the rule for amended pleadings. *Caruso v. Int'l Bhd. of Teamsters*, 100 Wn.2d 343, 670 P.2d 240 (1983).

The standard of review for denial of a motion to supplement pleadings, like that for denial of a motion to amend, is abuse of discretion. *Caruso v. Int'l Bhd. of Teamsters*, 100 Wn.2d 343, 670 P.2d 240 (1983).

And, significantly, contrary to a motion to amend, CR 15(d) contains no requirement imposed pm the trial judge that leave to

supplement be "freely given". *Herron v. Tribune Pub. Co.*, 108 Wn.2d 162 (1987).

Here, in addition to the above basis, any Appellant motion to amend/for supplemental pleadings was/would have been properly denied because the act would have been futile, given that the statute of limitation has passed. Factors which a trial court may be consider in determining whether to permit amendment is whether the amendment would be **futile**. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 142, 937 P.2d 154, 943 P.2d 1358 (1997). In determining whether prejudice would result, Courts may consider potential delay, unfair surprise, and **the probable merit or futility of the amendments requested**. *Estate of Becker v. Forward Tech. Indus., Inc.*, 192 Wn. App. 65 (2015). *Emphasis provided.*

In *Protect the Peninsula's Future v. City of Port Angeles,* 175 Wn. App. 201, 304 P3rd 914 (2013) the Appeals Court upheld denial of an amendment to Complaint where Plaintiff sought the trial court's leave to amend the complaint by adding a request that the trial court declare that the Cities' fluorides are drugs. The trial court denied the motion on the grounds that it would be futile, given that fluorides in public drinking water were held not to be

drugs in *Kaul v. City of Chehalis*, 45 Wn.2d 616, 625, 277 P.2d 352 (1954). The same reasoning applies here. Any Appellant motion to amend his complaint to add new facts and a new PRA cause of action, was made long after the time limitation to do so has passed. Any such amendment would have been futile. "Where the legal basis for a cause of action is **tenuous, futility supports the refusal to grant leave to amend**." *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 986 (9th Cir. 1999). Emphasis provided.

D. Court did not Abuse its Discretion.

A trial court's exercise of discretion is manifestly unreasonable if no reasonable person would concur with the Court's view when the Court applies the correct legal standard to supported facts. *Mayer v. Sto Indu., Inc.*, 156 Wn.2d 677, 684 (2006); *quoting State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A trial court's exercise of discretion rests upon untenable grounds if the trial court relies upon unsupported facts or applies the wrong legal standard. *Id.*

"We do not reverse a discretionary decision absent a clear showing that the trial court's exercise of its discretion was manifestly unreasonable or exercised on untenable grounds or

for untenable reasons." *City of Puyallup v. Hogan*, __Wn.App.__, 277 P.3d 49 (Div. 2, 2012).

Appellate courts are loath to substitute their discretion for that of the trial court, which is what the Appellant actually requests. *A.G. v. Corporation of Catholic Archbishop of Seattle*, 162 Wn.App. 16, 25, 271 P.3d 249 (Div. 1, 2011), and cases cited therein. ("An appellate court does not substitute its own judgment for that of the trial court, but rather, looks to whether the court's exercise of discretion was manifestly unreasonable, or made for untenable reasons.")

An appellate court does not substitute its own judgment for that of the trial court, but rather, looks to whether the court's exercise of discretion was manifestly unreasonable, or made for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971), *Overruled on other grounds by RCW 71.05.390, explained by Seattle Times Co. v. Benton County*, 99 Wn.2d 251, 263 661 P.2d 964 (1983). The Supreme Court of Washington recently held such substitution to be reversible error. *Teter v. Deck*, __Wn.2d__, 274 P.3d 336, 346, 274 P.3d 336 (2012) ("We will not substitute our own judgment in evaluating the scope and effect of that misconduct").

Here, by appealing the denial of a "motion to amend," the Appellant asks that this Court engage in exactly the judgment substitution that the Supreme Court expressly prohibits. Appellant's invitation to substitute judgment and this appeal should be summarily rejected on the grounds that Appellant requests relief that the Court cannot and should not grant under *Hogan,* 277 P.3d 49 and its log line of prior cases in accord.

7. Appellant Argument Not Supported by Analysis or Authority should be Wholly Disregarded.

Appellant makes no showing or provides any support for his claim that "The Court erred in failing to afford West an objectively impartial process in accord with the Appearance of Fairness and the 5th Amendment".[41] Accordingly, that assignment of error is waived. RAP 10.3(a)(6); *Olympic Tug & Barge, Inc. v. Dep't of Revenue,* 188 Wn. App. 949, 959 n. 9, 355 P.3d 1199 (2015), *review denied,* 184 Wn.2d 1039 (2016).

8. Appellant's Attempts to Litigate Issues outside the Appeal Should be Ignored.

In the first Appellate Court ruling in this case, this Appellate Court took note that Appellant improperly strayed far afield from proper issues on appeal, and refused to consider those issues:

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[41] *Appellant Opening Brief,* Section VIII at 44.

> West next argues that "the Trial Court refused to consider whether the Port had violated the [Public Records Act], even though the Port' s violations were apparent at the times that Mr. West noted up the show cause hearings." Br. of Appellant at 38 -39. By making this argument, West is attempting to advance his argument on the merits of his claim. Although neither party questions the propriety of this argument, **we do not consider it because it challenges decisions that are neither (1) appealable as a matter of right nor (2) within the scope of West' s appeal from the order of dismissal**.

CP 709-725 at 722. Appellant repeats that same misstep here.[42] Further Appellant also seeks review of issues outside the scope of his appeal through a skewed, inexplicably lengthy, fifty-odd page Brief when entire sections seems to exist for the sole purpose of highlighting Port policy decisions with which Appellant apparently disagrees, and seeking review of substantive Public Record Act issues which are far outside the scope of this appeal of the dismissal order.[43] This Court should similarly refuse to consider Appellant's out of bounds issues for all the same reasons:

> The only two methods for seeking review of a superior court's decision are appeal as a matter of right and discretionary review. RAP 2. 1(a). RAP 2. 2(a) lists the types of decisions that are appealable -as a matter of right.- *In re Dependency of Chubb*, 112 Wn.2d 719, 721, 773 P. 2d 851 (1989). But a decision on a party's motion seeking a show cause hearing to determine the merits of the party' s claim is not appealable as a matter of right under RAP 2. 2(a). *Meadow Park Garden Assocs. v. Canley*, 54 Wn. App. 371, 372, 773 P. 2d 875 (1989). Here, West's second

[42] *Appellant Opening Brief,* Section VIII at 44-50.
[43] *Appellant Opening Brief at 7-10, 19-21, 47-50.*

notice of appeal sought review of the order of dismissal and " all interlocutory orders," apparently including the decisions on West' s show cause motions. CP at 662. But a notice of appeal is not a proper method of seeking review of these decisions because they are not appealable as a matter of right. *Chubb*, 112 Wn.2d at 721; *Meadow Park*, 54 Wn. App. at 372.

In addition, West's challenge to the trial court's decisions on his show cause motions is outside the scope of his appeal from the order of dismissal.

Under RAP 2. 4(b), the scope of our review of trial court decisions not designated in the notice. of appeal includes decisions that (1) prejudicially affected the order designated in the notice of appeal and (2) occurred before we accepted review. A decision prejudicially affected an order if the order would not have happened but for the earlier decision. *Right -Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 380, 46 P. 3d 789 (2002). Because the order of dismissal would have happened regardless of-the trial court' s decisions on West' s show cause motions, the decisions on the show cause motions did not prejudicially affect the order of dismissal. Thus-the trial court's orders on West' s show cause motions are neither appealable as a matter of right nor within the scope of West's appeal from the order of dismissal. See RAP 2. 2, 2.4. **Therefore, we decline to consider West's argument.**

E. Port Should Be Awarded Fees & Costs

The Port requests attorney fees and costs based on this frivolous appeal. RAP 18.1;[44] RCW 4.84.185.[45] and RAP 18.9.[46] A lawsuit is

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[44] RAP 18.1. **(a) Generally.** If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

(b) Argument in Brief. The party must devote a section of its opening brief to the request for the fees or expenses. Requests made at the Court of Appeals will be considered as continuing requests at the Supreme Court. The request should not be made in the cost bill. In a motion on the merits pursuant to rule 18.14, the

frivolous when it cannot be supported by any rational argument on the law or facts. *Tiger Oil Corp. v. Department of Licensing,* 88 Wash.App. 925, 938, 946 P.2d 1235 (1997).

Appellant's pursuit of this appeal requires scarce Port taxpayer dollars to be spent once again defending against off topic and baseless claims. The Port requests this Court order Appellant to pay its attorney fees and costs for having to respond yet again to these frivolous matters. RAP 18.1, RAP18.9 and or RCW 4.84.185.

An appeal is clearly without merit if the issues on review: (1) are clearly controlled by settled law; (2) are factual and supported by the evidence; or (3) are matters of judicial discretion and the

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request and supporting argument must be included in the motion or response if the requesting party has not yet filed a brief.

[45] **4.84.185. Prevailing party to receive expenses for opposing frivolous action or defense.** In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

[46] **RULE 18.9 VIOLATION OF RULES**

(a) Sanctions. The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or other authorized person preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules **to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply** or to pay sanctions to the court.

decision was clearly within the discretion of the trial court or administrative agency. *State v. Rolax*, 104 Wn.2d 129, 132, 702 P.2d 1185 (1985). Although any one prong under *Rolax* will suffice to entitle the Port to a fee award, this appeal meets all three prongs:

(1) *Hobbs* is well-settled law which defeats this appeal,
(2) the facts of the Port's on-going response to Appellant's PRA request, the futility of Appellant's Motion to Amend and Appellant's repeat of seeking improper review of Court's Show Cause rulings and straying from issue on appeal are factual and supported by the record, and
(3) any Appellant Motion to Amend was a discretionary decision which the Trial Court properly denied.

The record here clearly demonstrates that the prerequisites for a attorney fee award is met. Further, under RAP 18.1(a), a party on appeal is entitled to attorney fees if a statute authorizes the award. RAP 18.9 authorizes the Court to award compensatory damages when a party files a frivolous appeal. *Kearney v. Kearney*, 95 Wn. App. 405, 417, 974 P.2d 872, *review denied*, 138 Wn.2d 1022 (1999). An appeal is frivolous if there are "'no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility' of success." *In re Recall of Feetham*, 149 Wn.2d 860, 872, 72 P.3d 741 (2003) (quoting *Millers Cas. Ins. Co. v. Briggs*, 100 Wn.2d 9, 15, 665 P.2d

887 (1983)). This appeal is frivolous. West presents no debatable point of law, his appeal (yet again) lacks merit, and the chance for reversal is nonexistent. This was true in his pleadings before the Superior Court; it remains true now. The Appellant was given the several opportunities for a graceful exit, without a monetary penalty to him, but he chooses to persist. Pursuing a frivolous appeal justifies the imposition of terms and compensatory damages. *Eugster v. City of Spokane* (2007) 139 Wash.App. 21, 156 P.3d 912.

IV. CONCLUSION

***Hobbs* Controls & Requires Dismissal.** Per *Hobbs,* 183 Wn. App at 936,at the time that Appellant asserted his cause of action in his complaint, there was no final Port action that constituted a denial of records and, thus, there was no basis for judicial review of the Port's response at the time Appellant filed this case. Appellant did not have a cause of action when he asserted that he did have a cause of action. **Pursuant to CR 12(b)(6)**, and *Hobbs*, Appellant's concession in his Show Cause Motion that the Port was actively responding to his records request properly triggered dismissal. **Alternatively the Trial Court properly dismissed pursuant to CR 56**. In his response to the Port's Motion and here on appeal, Appellant failed to dispute the

centerpiece material fact which underpins the Port's dismissal Motion - that the Port's responsive efforts were ongoing and not yet final. Therefore, the Port has met its burden to show that the undisputed facts on record entitled the Port to a summary dismissal under *Hobbs*. **The *Hill* case relied on by Appellant is totally distinguishable** and does not support Appellant's claimed due process violation in any way. Rather, Appellant misused and misapplied the procedures available to him, filing his law suit far too early and before a valid PRA cause of action had accrued. Because the Port pointed out in the beginning, and maintained throughout, that West's lawsuit was premature, **the Port was in no way estopped from re-asserting this same position in its dismissal motion.** Last, Mr West claims he sought to amend his complaint to add new facts and a new PRA cause of action, after the time limitation to do so has passed. Any such **amendment would have been futile**, and if made, was properly denied. The Port respectfully requests that this Court deny the appeal and award the Port and its taxpayers their fees and costs.

RESPECTFULLY SUBMITTED this 6th day of December 2016.

GOODSTEIN LAW GROUP PLLC
By: */S/Carolyn A. Lake*
Carolyn A. Lake, WSBA #13980
Attorneys for Respondent Port

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ARTHUR WEST APPELLANT, V. PORT OF TACOMA RESPONDENT.	NO. 48110-3-II DECLARATION OF SERVICE

The undersigned declares that I am over the age of 18 years, not a party to this action, and competent to be a witness herein. I caused this Declaration and the following documents:

1. RESPONSE BRIEF OF PORT OF TACOMA

to be served on December 6, 2016 served on the following parties and in the manner indicated below:

Arthur West, Pro Se
120 State Avenue, N.E. #1497
Olympia, WA 98501
Email: awestaa@gmail.com

[X] by United States First Class Mail
[ ] by Legal Messenger
[X] by Electronic Mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 6th day of December, 2016 at Pierce County Washington.

Carolyn A. Lake

LexisNexis

User Name: Carolyn A Lake
Date and Time: Dec 06, 2016 18:30
Job Number: 40543703

Document (1)

1. *Hobbs v. Wash. State Auditor's Office, 183 Wn. App. 925*
   Client/Matter: Port of tacoma PRR
   Search Terms: Hobbs v. State, 183 Wash. App. 925, 335 P.3d 1004 (Div. 2, 2014)
   Search Type: Natural Language
   Narrowed by:

Content Type	Narrowed by
Cases	-None-

APPENDIX 1

Hobbs v. Wash. State Auditor's Office

Court of Appeals of Washington, Division Two

October 7, 2014, Filed

No. 44284-1-II

Reporter
183 Wn. App. 925 *; 335 P.3d 1004 **; 2014 Wash. App. LEXIS 2434 ***

MIKE HOBBS, *Appellant*, v. THE WASHINGTON STATE AUDITOR'S OFFICE, *Respondent*.

Subsequent History: Motion denied by *Hobbs v. Wash. State Auditor's Office, 2015 Wash. LEXIS 376 (Wash., Apr. 1, 2015)*

Prior History: [***1] Appeal from Thurston Superior Court. Docket No: 11-2-02725-0. Judge signing: Honorable Lisa L Sutton. Judgment or order under review. Date filed: 11/09/2012.

Core Terms

records, public records request, documents, requester, installment, e-mail, redactions, superior court, agency's, responsive, violations, whistle-blower, cured, first installment, public record, investigator, responding, penalties, cause of action, electronic, estimated, metadata, lawsuit, copies, issues, final action, updated, alleged violation, initial response, agency's action

Case Summary

Overview

HOLDINGS: [1]-Plaintiff did not have standing to initiate an enforcement lawsuit under *Wash. Rev. Code § 42.56.550* because the agency had not yet taken some form of final action by denying production of requested records or by not providing responsive documents as required by *Wash. Rev. Code § 42.56.520*; [2]-Plaintiff was not entitled to an award of penalties for alleged violations by the agency because the agency was still responding to the request and was not foreclosed from voluntarily curing the violations while the request remained open; [3]-The agency did not violate statutory response requirements by indicating in a timely response letter that the requested records would be produced on an installment basis and estimating the date the first installment would be completed.

Outcome

Judgment for the agency was affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Administrative Law > Judicial Review > Standards of Review > De Novo Standard of Review

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > General Overview

Administrative Law > ... > Enforcement > Judicial Review > Standards of Review

HN1 An appellate court reviews agency actions challenged under the Public Records Act, *Wash. Rev. Code §§ 42.56.030*-.520, de novo.

Governments > Legislation > Interpretation

HN2 When interpreting a statute, a court must determine and enforce the legislature's intent. Where the meaning of statutory language is plain on its face, a court will give effect to that plain meaning as an expression of legislative intent.

Governments > Legislation > Interpretation

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > General Overview

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > General Overview

Administrative Law > ... > Freedom of Information > Enforcement > General Overview

HN3 When interpreting provisions of the Public Records Act (PRA), Wash. Rev. Code ch. 42.56, a court considers the PRA in its entirety to effectuate the PRA's overall purpose.

Administrative Law > ... > Judicial Review > Reviewability > Standing

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > General Overview

Administrative Law > ... > Freedom of Information > Methods of Disclosure > General Overview

HN4 Under the Public Records Act (PRA), Wash. Rev. Code ch. 42.56, a requestor may initiate a lawsuit to compel compliance with the PRA only after an agency has engaged in some final action denying access to a record.

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > General Overview

Administrative Law > ... > Judicial Review > Reviewability > Standing

Administrative Law > Judicial Review > Reviewability > Standing

Administrative Law > ... > Freedom of Information > Methods of Disclosure > General Overview

HN5 Under *Wash. Rev. Code § 42.56.550(1)*, a superior court may hear a motion to show cause when a person has been denied an opportunity to inspect or copy a public record by an agency. Therefore, being denied a requested record is a prerequisite for filing an action for judicial review of an agency decision under the Public Records Act (PRA), Wash. Rev. Code ch. 42.56. Although the statute does not specifically define "denial" of a public record, considering the PRA as a whole, a denial of public records occurs when it reasonably appears that an agency will not or will no longer provide responsive records.

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > General Overview

Administrative Law > ... > Freedom of Information > Methods of Disclosure > General Overview

HN6 See *Wash. Rev. Code § 42.56.520*.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > General Overview

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > General Overview

Administrative Law > Judicial Review > Reviewability > Standing

Administrative Law > ... > Judicial Review > Reviewability > Standing

HN7 Before a requestor initiates a Public Records Act, Wash. Rev. Code ch. 42.56, lawsuit against an agency, there must be some agency action, or inaction, indicating that the agency will not be providing responsive records. The plain language of the statute does not support the claim that a requester is permitted to initiate a lawsuit before an agency has taken some form of final action in denying the request by not providing responsive documents.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > General Overview

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > General Overview

HN8 Even when an agency actually violates the Public Records Act, Wash. Rev. Code ch. 42.56, the agency is not foreclosed from later curing that violation by offering a satisfactory explanation for the redaction or withholding of documents.

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > General Overview

Administrative Law > ... > Freedom of Information > Methods of Disclosure > General Overview

HN9 Agencies can cure Public Records Act, Wash. Rev. Code ch. 42.56, violations by voluntarily remedying the alleged problem while a records request is open and the agency is actively working to respond to it.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > General Overview

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > General Overview

Administrative Law > ... > Judicial Review > Reviewability > Standing

Administrative Law > Judicial Review > Reviewability > Standing

Administrative Law > ... > Freedom of

Information > Sanctions Against Agencies > General Overview

HN10 When an agency diligently makes every reasonable effort to comply with a requestor's public records request, and the agency has fully remedied any alleged violation of the Public Records Act, Wash. Rev. Code ch. 42.56, at the time the requestor has a cause of action (i.e., when the agency has taken final action and denied the requested records), there is no violation entitling the requester to penalties or fees.

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > General Overview

Administrative Law > ... > Freedom of Information > Enforcement > General Overview

Administrative Law > ... > Freedom of Information > Methods of Disclosure > General Overview

HN11 The purpose of the Public Records Act (PRA), Wash. Rev. Code ch. 42.56, is to encourage open and transparent government by ensuring public access to government records. Wash. Rev. Code § 42.56.030. As a policy matter, the purpose of the PRA is best served by communication between agencies and requestors, not by playing "gotcha" with litigation. In cases where an agency is making every effort to cooperate with a requestor to provide requested records, there certainly cannot be any legitimate purpose served by initiating a lawsuit prior to the agency making a final decision regarding what documents it will and will not produce.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > General Overview

Administrative Law > ... > Freedom of Information > Enforcement > General Overview

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > General Overview

HN12 Wash. Rev. Code § 42.56.520 governs an agency's initial response to a Public Records Act, Wash. Rev. Code ch. 42.56, request.

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > General Overview

Administrative Law > ... > Freedom of Information > Methods of Disclosure > General Overview

HN13 See Wash. Rev. Code § 42.56.520.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > General Overview

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > General Overview

HN14 Wash. Rev. Code § 42.56.080 allows an agency to produce records on a partial or installment basis.

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > General Overview

Administrative Law > ... > Freedom of Information > Methods of Disclosure > General Overview

HN15 Under the Public Records Act, Wash. Rev. Code ch. 42.56, there are two ways for an agency to respond to a public records request. An agency can (1) make the records available for inspection or copying or (2) respond by including an explanation of the exemption authorizing the agency to withhold the record. Wash. Rev. Code § 42.56.210(1) and (3). The plain language of Wash. Rev. Code § 42.56.520 requires that an agency provide a reasonable estimate of the time required to respond to a request. An agency can make records available on an installment basis. Wash. Rev. Code § 42.56.080.

Governments > Legislation > Interpretation

HN16 When interpreting a statute, a court must not add words where the legislature has chosen not to include them.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > General Overview

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > General Overview

HN17 Wash. Rev. Code § 42.56.520 does not require an agency to provide an estimate of when it will fully respond to a public records request when the legislature has declined to include such language in the statute.

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > General Overview

Administrative Law > ... > Freedom of Information > Methods of Disclosure > General Overview

HN18 The adequacy of an agency's records search is judged by a standard of reasonableness, that is, the

search must be reasonably calculated to uncover all relevant documents. Washington courts have adopted the federal courts' reasonableness standard as articulated by the Tenth Circuit Court of Appeals: The focal point of the judicial inquiry is the agency's search process, not the outcome of its search. The issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate, which is determined under a standard of reasonableness, depending on the circumstances of the case. The reasonableness of an agency's search turns on the likelihood that it will yield the sought-after information, the existence of readily available alternatives, and the burden of employing those alternatives.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Record Requests

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > General Overview

HN19 At a minimum, a person seeking documents under the Public Records Act, Wash. Rev. Code ch. 42.56, must identify the documents with sufficient clarity to allow the agency to locate them. Agencies are not required to be mind readers.

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > General Overview

Administrative Law > ... > Freedom of Information > Methods of Disclosure > General Overview

HN20 A court inquires into the scope of an agency's search as a whole and whether the search was reasonable, not whether the requestor has presented alternatives that are believed would have more accurately produced the records requested.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Civil Procedure > Appeals > Costs & Attorney Fees

HN21 *Wash. R. App. P. 18.1* allows an appellate court to grant attorney fees if authorized by statute.

Civil Procedure > Appeals > Costs & Attorney Fees

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Administrative Law > Judicial Review > Remedies > General Overview

Administrative Law > ... > Sanctions Against Agencies > Costs & Attorney Fees > Grounds for Recovery

HN22 *Wash. Rev. Code § 42.56.550(4)* allows a person who prevails against an agency to be awarded costs and attorney fees.

Headnotes/Syllabus

Summary

WASHINGTON OFFICIAL REPORTS SUMMARY

Nature of Action: Action to enforce a request for the production of public records by the state auditor's office under the Public Records Act. The action was filed while the auditor's office was still responding to the request on an installment basis.

Superior Court: The Superior Court for Thurston County, No. 11-2-02725-0, Lisa L. Sutton, J., on November 9, 2012, dismissed the action with prejudice, ruling that the initial response by the auditor's office complied with the statutory requirement to provide a response within five days and that, after the initial response, the auditor's office had continued to communicate with the plaintiff regarding the dates additional responses would be provided; that the auditor's office did not deny the plaintiff access to electronic records or metadata because providing records in updated installments while the public records request was still pending was not a "denial" of records for purposes of the Public Records Act; and that the scope of the auditor's office search was adequate and that the auditor's office reasonably interpreted the plaintiff's public records requests.

Court of Appeals: Holding that the plaintiff did not have standing to initiate an enforcement action at the time he filed suit because the auditor's office had not yet taken some form of final action by denying production of requested records or by not providing responsive documents, that the plaintiff was not entitled to an award of penalties for alleged violations by the auditor's office because the office was still responding to the request and was not foreclosed from voluntarily curing the violations while the request remained open, and that the auditor's office did not violate statutory response requirements by indicating in a timely response letter that the requested records would be produced on an installment basis and estimating the date the first installment would be completed, the court *affirms* the

dismissal order.

Headnotes

WASHINGTON OFFICIAL REPORTS HEADNOTES

WA[1] [1]

Open Government > Public Disclosure > Judicial Review > Appellate Review > De Novo Review.

An appellate court reviews de novo agency actions challenged under *RCW 42.56.030* through *RCW 42.56.520* of the Public Records Act.

WA[] [2]

Statutes > Construction > Legislative Intent > In General.

A court interprets a statute to determine and enforce the legislature's intent.

WA[3] [3]

Statutes > Construction > Statutory Language > Plain Meaning > Unambiguous Language.

When the meaning of statutory language is plain on its face, a court will give effect to that plain meaning as an expression of the legislature's intent.

WA[4] [4]

Open Government > Public Disclosure > Statutory Provisions > Construction > Considered as a Whole > Statutory Purpose.

The Public Records Act (ch. 42.56 RCW) is construed as a whole to effectuate the act's overall purpose.

WA[5] [5]

Open Government > Public Disclosure > Judicial Review > Right to Review > Final Agency Action > Necessity.

A person who requests an agency to produce public records under the Public Records Act (ch. 42.56 RCW) may not initiate an enforcement action against the agency unless and until the agency takes some form of final action on the request or there is inaction by the agency indicating that the agency will not be providing responsive records. Under *RCW 42.56.550(1)*, an agency's denial of a public records request is a prerequisite to filing an action for judicial review of the agency's actions under the act. An agency may be deemed to have denied a public records request when it reasonably appears that the agency will not or will no longer provide responsive records.

WA[6] [6]

Open Government > Public Disclosure > Response by Agency > Failure To Properly Respond > Opportunity To Cure > Right of Action Not Yet Accrued.

At any time before an agency takes final action on a public records request under the Public Records Act (ch. 42.56 RCW), at which time the requester may seek judicial enforcement of the request, the agency may voluntarily cure any violations of the act committed in responding to the request. An agency may voluntarily cure an alleged violation of the act while a request for public records remains open and the agency is actively engaged in efforts to fully respond to the request. If the agency diligently makes every effort to comply with a records request and remedies any alleged violations of the act before the requester's cause of action accrues, there is no violation entitling the requester to penalties; the requester cannot obtain judicial relief for alleged violations of the act before the requester has a cause of action under the act.

WA[7] [7]

Open Government > Public Disclosure > Response by Agency > Partial or Installment Basis > Estimate of Date for Completing First Installment > Sufficiency.

An agency may timely and adequately respond to a request for public records under *RCW 42.56.520* by sending a response letter to the requester within five days of the request stating that the records will be produced in installments and providing an estimated date for completion of the first installment. *RCW 42.56.520* does not require an agency providing records in installments to provide an estimated date for producing all of the records in the agency's initial response letter.

WA[8] [8]

Statutes > Construction > Omitted Language > In General.

When interpreting a statute, a court must not add words where the legislature has chosen not to include them.

WA[9] [9]

Open Government > Public Disclosure > Response by Agency > Search for Records > Adequacy > Test > Reasonableness > Determination > Analysis > Factors.

The adequacy of an agency's search for records requested under the Public Records Act (ch. 42.56 RCW) is judged by a standard of reasonableness. The search must be reasonably calculated to uncover all relevant documents. The focus of a court's inquiry is the agency's search process, not the outcome of the search. The issue is not whether any further documents might conceivably exist but, rather, whether the agency's search for responsive documents was adequate, which is determined under a standard of reasonableness and depends on the circumstances of the case. The reasonableness of an agency's search turns on the likelihood that it will yield the sought-after information, the existence of readily available alternatives, and the burden of employing those alternatives.

WA[10] [10]

Open Government > Public Disclosure > Public Records > Request > Specificity.

A person requesting an agency to produce public records under the Public Records Act (ch. 42.56 RCW) must identify the sought-after documents with sufficient clarity to allow the agency to locate them. An agency is not required to be a mind reader.

WA[11] [11]

Open Government > Public Disclosure > Response by Agency > Search for Records > Adequacy > Test > Reasonableness > Determination > Search Viewed as a Whole.

In determining the adequacy of an agency's search for records requested under the Public Records Act (ch. 42.56 RCW), a court inquires into the scope of the agency's search as a whole and whether the search was reasonable, not whether the requester has presented alternatives that the requester believes would have more accurately produced the records requested.

WA[12] [12]

Open Government > Public Disclosure > Response by Agency > Search for Records > Adequacy > Scope of Search.

An agency's search for records requested under the Public Records Act (ch. 42.56 RCW) may satisfy the standard of reasonableness where the agency assigns several people to conduct the search; numerous search terms are identified that would reveal responsive records; such terms are used to search numerous places where electronic documents are stored, including shared file systems, e-mail files, and paper files; and thousands of pages of documents are identified, including prior and backup versions of documents, e-mails, and other responsive documents. A requester's later identification of additional documents the requester believes fall within the scope of the request does not mean that the agency's search was unreasonable if the record shows that the agency performed a comprehensive search of its paper and electronic files using numerous terms meant to comprehensively identify records responsive to the request.

WA[13] [13]

Open Government > Public Disclosure > Attorney Fees > On Appeal > Prevailing Party > Necessity.

RCW 42.56.550(4) does not authorize an award of appellate attorney fees to a nonprevailing party.

LEE, J., delivered the opinion for a unanimous court.

Counsel: *Christopher W. Bawn*, for appellant.

Robert W. Ferguson, *Attorney General*, and *Jean M. Wilkinson* and *Linda Anne Dalton*, *Managing Assistants*, for respondent.

Judges: Authored by Linda CJ Lee. Concurring: J. Robin Hunt, Bradley A. Maxa.

Opinion by: Linda CJ Lee

Opinion

[*928] [1005]**

¶1 LEE, J. — Mike Hobbs appeals the superior court's order dismissing his Public Records Act (PRA)[1] claim against the State Auditor's Office (Auditor). Hobbs argues that the superior court erred in concluding that the Auditor cannot be liable for potential errors while a PRA request is **[*929]** still pending, the Auditor's initial response letter was adequate, and the scope of the

[1] *Ch. 42.56 RCW.*

Auditor's search was reasonable. Because we hold the superior court did not err, we affirm.

FACTS

¶2 On November 28, 2011, attorney Christopher W. Bawn filed a PRA request to the Auditor on behalf of his client Mike Hobbs. The request was for public records related to the Auditor's investigation of a whistle-blower complaint regarding the Department of Social and Health Services [***2] (DSHS) and the use of "SSI[2][1] Dedicated Accounts" for foster children. Clerk's Papers (CP) at 105. The request included a large amount of technical information related to the records and record retention. Mary Leider, the Auditor's public records officer, received the request.

A. AUDITOR'S RESPONSE TO HOBBS' REQUEST

¶3 On December 2, 2011, Leider sent Hobbs a response letter stating, "As we understand the subject matter of your request, you are requesting all records related to investigations of DSHS that pertain specifically to SSI Dedicated Accounts." CP at 108. The letter informed Hobbs that the records would be provided in installments and that the Auditor expected the first installment to be available for inspection, by [**1006] appointment, anytime after December 16. The letter also stated that DSHS client records would be sent first to DSHS to ensure all the appropriate redactions were made to protect the foster children's privacy. [***3]

¶4 Leider was unable to contact Hobbs' attorney by phone or e-mail to arrange for the inspection of documents; so on December 21, the Auditor made the first installment [*930] of records available to Hobbs electronically. As discussed in more detail below, Hobbs responded to this first installment by filing suit against the Auditor for alleged PRA violations.[3]

¶5 On December 30, the Auditor provided Hobbs with a new copy of the documents, using code numbers the Auditor created to correspond to explanations of the redactions. Leider also informed Hobbs that the next installment of records would be ready on January 13, 2012.

¶6 On January 6, 2012, the Auditor's counsel sent Hobbs a letter confirming his requested prioritization of his three pending records requests (two of which are not the subject of this appeal) and stating,

> In our conversation, I requested that you contact me if you believe the Auditor has made a mistake in processing your public records requests. The Auditor wants to hear from you if you think there are problems, so the Auditor may address your concerns promptly if [***4] it is possible to do so. This request for cooperation from you pertains to any concerns you may have about redactions, validity or explanation of claimed exemptions, or other concerns. For example, you mentioned that the Auditor's public records officer provided you with an updated version of the first installment of its response to your November 28, 2011 request, and that this update was provided promptly. This approach avoids unnecessary use of the court's time and resources.

CP at 121-22. Also on January 6, Leider sent Hobbs an e-mail informing him that the final installment of records would be ready on February 13.

¶7 On January 19, Leider contacted Hobbs to inform him of some technical issues that had arisen in providing e-mails containing metadata. After consulting with Pete Donnell, audit manager for the statewide technology audit team, the Auditor developed a method to provide the [*931] documents in the format that Hobbs had requested. Leider informed Hobbs that she would prepare five e-mails, send them to Hobbs to confirm they were in an acceptable format, and then process the remaining 88 e-mails. After confirming the e-mails were in a format acceptable to Hobbs, Leider told Hobbs the remaining [***5] 88 e-mails would be ready on March 1.

¶8 On February 13, Leider sent Hobbs the first 1,010 pages of the foster child records redacted by DSHS. On February 14, Leider provided Hobbs with another updated copy of the December 30, 2011 production addressing additional concerns Hobbs' attorney had raised. On February 16, Leider provided the remaining 1,010 pages of foster child records redacted by DSHS. On February 17, Leider sent Hobbs an e-mail stating that she had identified technical issues with some of the files and sent Hobbs another copy of the DSHS records

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[2] "SSI" is the acronym for Supplemental Security Income and is a federal income supplement program designed to help aged, blind, and disabled people who have little or no income. *Supplemental Security Income Home Page—2014 Edition*, U.S. SOC. SECURITY ADMIN., http://www.ssa.gov/ssi/ (last visited Sept. 26, 2014).

[3] Hobbs filed a lawsuit against the Auditor on December 23, two days after Leider made the December 21 installment available.

with corrections to resolve the technical issues.

¶9 On February 27, Leider sent Hobbs another e-mail stating that she had reviewed a declaration he had submitted to the court complaining about technical issues involving the metadata of the 17 different versions of the Auditor's whistle-blower investigation closure letter. Leider stated that she had consulted with Donnell, corrected the problem, and was providing new versions of the letter with the metadata issues resolved.

¶10 On March 1, Leider provided Hobbs with the additional e-mails that Leider had contacted Hobbs about on January 19. She also sent Hobbs an e-mail stating that the Auditor **[***6]** believed it had provided all the responsive documents to Hobbs' public records request, and that Hobbs should contact her with any concerns he may have.
[1007]**

¶11 On March 29, Leider sent Hobbs an e-mail in which she noted that Hobbs had not downloaded the final installment of the records from March 1 and that the link to the "Secure File Transfer System" had expired. CP at 302. She **[*932]** notified Hobbs that she was reposting a new transfer link so that he would be able to access the installment.

B. HOBBS' LITIGATION AGAINST THE AUDITOR

¶12 Meanwhile, on December 23, 2011, almost immediately after the Auditor had provided the first installment of documents in response to Hobbs' public records request, Hobbs filed suit against the Auditor for alleged PRA violations, primarily complaining about redactions to the records produced in the December 21, 2011 first installment. On January 20, 2012, Hobbs filed a motion requesting in camera review of the Auditor's December 21 and December 30[4] installments of produced records. The superior court heard the motion on February 14 and reviewed both the December 21 and December 30 productions in camera. On February 15, the superior court ruled that exemption codes the Auditor had **[***7]** used complied with the PRA requirements.

¶13 On February 17, based on the superior court's ruling after the in camera review, the Auditor filed a motion seeking a ruling that (1) "the redactions contained in the Auditor's December 30, 2011 production, as supplemented by the 5 pages of updated redactions provided to the requester on February 14, 2012, [were] proper" and (***2***) Hobbs had no cause of action with respect to the December 21, December 30, and February 14 installments because the Auditor was still in the process of responding to Hobbs' public records request and, thus, had not denied Hobbs any records. CP at 143. On March 30, the superior court ruled that the redactions made in the December 30 installment, as updated in the February 14 installment, complied with the PRA. And, the superior court ruled that Hobbs did not have a cause of action as to the December 21, December 30, and February 14 installments.
[*933]

¶14 A final hearing on Hobbs' suit against the Auditor was held on August 17, 2012, after the Auditor's final installment **[***8]** of Hobbs' public records request. Hobbs raised numerous issues, including that (1) the Auditor's response letter on December ***2***, 2011 violated the PRA because it did not contain a date for when the response to his request would be completed; (***2***) the initial copies of the letter closing the whistle-blower investigation (the December 21 installment) were disclosed with improper metadata; (3) the investigator originally assigned to the case did not properly search her electronic case file, and thus, certain records were not disclosed; (4) the Auditor improperly interpreted Hobbs' public records request and did not include documents such as file folder tabs and documents recovered from disaster recovery tapes; and (5) the first installment of records was improperly redacted.[5]

¶15 The Auditor submitted numerous declarations from employees who had worked on compiling the responses to Hobbs' public records request. Leider submitted an affidavit comprehensively explaining the entire process of responding to Hobbs' public records request. Kim Hurley, the special investigations manager, declared **[***9]** that she had compiled numerous search terms and used those terms to search "the Auditor's Sharepoint program for documents related to Whistleblower case 10-005, my individual Outlook mailboxes, Teammate, and my Auditor network folder." CP at 246. She had also searched the Auditor's "evault," which stores all Auditor employee e-mails in a place where employees cannot delete them. CP at 246.

¶16 Julie Cooper, the special investigations coordinator,

[4] The December 30 response included the same documents provided in the December 21 installment, but with code numbers that corresponded to explanations for the redactions.

[5] Hobbs also stated he would not "waive" this issue, despite the superior court's earlier adverse rulings. CP at 653.

declared that she had searched her own e-mail box and two other employees' e-mail boxes for responsive e-mails and documents. She had also searched the "evault" to ensure all responsive e-mails were disclosed to Leider. CP at 243. Jan Jutte, the director of legal affairs, declared **[**1008]** that she had **[*934]** worked with Leider on compiling the response to Hobbs' public records request, which work had included numerous discussions and meetings to plan and coordinate the interpretation, search, collection, and redaction of responsive records.

¶17 Cheri Elliott was the original investigator assigned to the whistle-blower complaint. She stated that she maintained a paper file of the investigation after closing the complaint and that the electronic documents were deleted after the investigation was closed **[***10]** and the paper file was compiled. After being notified of the public records request, she had scanned the final paper file into an electronic document for disclosure. She had also searched her e-mail boxes and her "Word program folder on the Auditor network." CP at 252. And, statewide technology audit team manager Donnell submitted an affidavit explaining how he had performed the e-mail redactions while maintaining the metadata. He also explained how he had corrected Hobbs' alleged problem with the metadata in the 17 different versions of the Auditor's letter closing the whistle-blower investigation.

¶18 On November 9, 2012, the superior court issued its final order, ruling that the Auditor's initial response complied with the PRA requirement to provide a response within five days and that, after the initial response, the Auditor had continued to communicate with Hobbs regarding the dates additional responses would be provided. The superior court concluded that the Auditor did not deny Hobbs access to the electronic records or metadata because providing records in updated installments while his public records requests were still pending was not a "denial" of records for PRA purposes. CP at 1373. The superior **[***11]** court also concluded that the scope of the Auditor's search was adequate and that the Auditor reasonably interpreted Hobbs' public records requests. Finally, the superior court declined to reconsider issues it had resolved in its previous rulings. The superior court dismissed Hobbs' PRA action with prejudice. Hobbs appeals.

[*935] ANALYSIS

¶19 Hobbs argues that the superior court erred by concluding that he had no cause of action based on the Auditor's December 21 first installment in response to his public records request. He also argues that the superior court erred by concluding that the Auditor's response letter was adequate, that the scope of the Auditor's search was reasonable, and that the Auditor reasonably interpreted Hobbs' public records request such that it had disclosed all requested documents. We disagree and affirm the superior court's dismissal of Hobbs' PRA claim.

WA[1-4] [1-4] ¶20 *HN1* We review agency actions challenged under *RCW 42.56.030 through RCW 42.56.520* de novo. *Rental Hous. Ass'n of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 536, 199 P.3d 393 (2009)*. *HN2* When interpreting a statute, we must determine and enforce the legislature's intent. *Rental Hous. Ass'n, 165 Wn.2d at 536*. Where the meaning of statutory language is plain on its face, we give effect to that plain meaning as an expression of legislative intent. *Rental Hous. Ass'n, 165 Wn.2d at 536*. *HN3* When interpreting provisions **[***12]** of the PRA, we consider the PRA in its entirety to effectuate the PRA's overall purpose. *Rental Hous. Ass'n, 165 Wn.2d at 536*.

A. PREMATURE LITIGATION

[5] [5] ¶21 Hobbs contends that the superior court erred by allowing the Auditor to supplement its responses after he had filed suit to correct alleged violations of the PRA. Specifically, Hobbs argues that any violations in the original installment were violations at the time they occurred and that he was entitled to penalties regardless of whether the violations were later corrected. Thus, Hobbs takes the position that a requester is permitted to initiate a lawsuit *prior* to an agency's denial and closure of a public records request. The PRA allows no such thing. *HN4* Under the PRA, a **[*936]** requester may only initiate a lawsuit to compel compliance with the PRA *after* the agency has engaged in some final action denying access to a record.

[1009]** 1. No PRA Cause of Action Until after Agency Denies the Public Records Requested

¶22 *HN5* Under *RCW 42.56.550(1)*, the superior court may hear a motion to show cause when a person has "been denied an opportunity to inspect or copy a public record by an agency." Therefore, being denied a requested record is a prerequisite for filing an action for judicial review of an agency decision under **[***13]** the PRA. Although the statute does not specifically define "denial" of a public record, considering the PRA as a whole, we conclude that a denial of public records

occurs when it reasonably appears that an agency will not or will no longer provide responsive records.

¶23 RCW 42.56.520 states, in relevant part,

> HN6 Denials of requests must be accompanied by a written statement of the specific reasons therefor. Agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives shall establish mechanisms for the most prompt possible review of decisions denying inspection, and such review shall be deemed completed at the end of the second business day following the denial of inspection and shall constitute *final agency action or final action* by the office of the secretary of the senate or the office of the chief clerk of the house of representatives for the purposes of judicial review.

(Emphasis added.) The language in RCW 42.56.520 itself refers to "final agency action or final action." Thus, based on the plain language of the PRA, we hold that HN7 before a requester initiates a PRA lawsuit against an agency, there must be some agency action, or inaction, indicating that the **[***14]** agency will not be providing responsive records.

¶24 Here, there is no dispute that the Auditor was continuing to provide Hobbs with responsive records until March 1, 2012, when the Auditor determined it had provided all responsive documents to Hobbs' public records **[*937]** request. Therefore, there could be no "denial" of records forming a basis for judicial review until March 1, 2012. The plain language of the statute does not support Hobbs' claim that a requester is permitted to initiate a lawsuit before an agency has taken some form of final action in denying the request by not providing responsive documents.[6]

2. Initial PRA Violations

[6] [6] ¶25 Hobbs also argues that once an agency has allegedly violated the PRA, that PRA violation exists as a basis for penalties and costs from the time of alleged violation until it is cured, even if it is cured before the requester would have a cause of action against the agency (i.e., when the agency takes final action in denying public records). In other words, if there were violations in the December 21 installment **[***15]** of records, he should be entitled to penalties and costs based on those violations from December 21 until the time the violations are cured. We disagree.

¶26 Hobbs cites four specific cases to support his contention that the superior court provided the Auditor with improper "do-overs" while litigation was pending, rather than ruling that he was entitled to penalties and fees because the Auditor had violated the PRA with its December 21 installment production. Br. of Appellant at 33. Specifically, Hobbs relies on *City of Lakewood v. Koenig*,[7] *Sanders v. State*,[8] *Gronquist v. Department of Licensing*,[9] and *Resident Action Council v. Seattle Housing Authority*.[10] Hobbs' reliance on these cases is misplaced.
[*938]

¶27 First, this court's recent decision in *Koenig* is inapplicable to this case. There was a single issue presented in *Koenig*—whether **[**1010]** a requester is entitled to penalties based solely on an agency's violation of the "brief explanation" requirement. Koenig, 176 Wn. App. at 399. Neither party disputed whether the records were properly redacted, and the City did not argue that it subsequently cured the violation by later explaining the redactions. *See* Koenig, 176 Wn. App. at 399-400. Accordingly, *Koenig* does not address the issue of whether **[***16]** a requester is entitled to penalties and fees for alleged violations of the PRA prior to the requester having a cause of action under the PRA based on an agency's final action in denying requested records.

¶28 Second, like *Koenig*, Sanders does not address the issue of whether a requester is entitled to penalties and fees for alleged PRA violations before the requester has a cause of action. However, *Sanders* does seem to suggest that agencies may have the opportunity for "do-overs." Br. of Appellant at 33. In *Sanders*, our Supreme Court held that, if an agency violates the "brief explanation" requirement in RCW 42.56.210(3), the agency is not precluded from subsequently offering an

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[6] Here the Auditor was producing records in installments. We do not address the situation where an agency completely ignores a records request for an extended period.

[7] City of Lakewood v. Koenig, 176 Wn. App. 397, 309 P.3d 610 (2013), *review granted*, **179 Wn.2d 1022 (2014)**.

[8] Sanders v. State, 169 Wn.2d 827, 240 P.3d 120 (2010).

[9] Gronquist v. Dep't of Licensing, 175 Wn. App. 729, 309 P.3d 538 (2013).

[10] Resident Action Council v. Seattle Hous. Auth., 177 Wn.2d 417, 327 P.3d 600 (2013).

explanation regarding how the claimed exemption applies. 169 Wn.2d at 847-48. Moreover, an agency is not precluded from arguing a different exemption applies to justify the redaction or withholding of a record after a lawsuit is initiated. Sanders, 169 Wn.2d at 847; Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wn.2d 243, 253, 884 P.2d 592 (1994). The agency's violation of the "brief explanation" requirement is only relevant insofar as it may increase the penalties imposed if documents are improperly redacted or withheld. Sanders, 169 Wn.2d at 848. Therefore, while *Sanders* fails to support Hobbs' assertion, *Sanders* does suggest that **HN8** even when the agency actually violates the **[***17]** PRA, the agency is not foreclosed from later curing that violation by offering a satisfactory explanation for the redaction or withholding of documents.
[*939]

¶29 Finally, neither *Gronquist* nor *Resident Action Council* addresses the issue of whether an agency can voluntarily cure an alleged violation of the PRA while the request remains open and the agency is actively engaging in efforts to fully respond to the request. In these two cases, the agencies maintained, in both the trial court and the appellate courts, that the documents at issue were either properly withheld or redacted. Gronquist, 175 Wn. App. at 746-54; Resident Action Council, 177 Wn.2d at 439-40. That is not the circumstance here. And *Gronquist* did not completely foreclose the possibility that an agency may voluntarily cure a PRA violation after litigation has commenced. Rather, *Gronquist* held that the agency's continued attempts to cure the violation during litigation were inadequate. 175 Wn. App. at 754.

¶30 Hobbs fails to cite to any authority to support his contention that an agency is categorically precluded from voluntarily curing alleged PRA violations while they are actively making reasonable efforts to fully respond to the public records request. However, **Division** Three of this court recently addressed a similar issue and **[***18]** its decision supports the assertion that **HN9** agencies can cure PRA violations by voluntarily remedying the alleged problem while the records request is open and the agency is actively working to respond to it.

¶31 In *Andrews v. Washington State Patrol*,[11] the Washington State Patrol (WSP) responded to a public records request by providing an estimated response date of May 1, 2012. 183 Wn. App. at 647. However, the WSP inadvertently forgot to send the requester an extension letter explaining that there would be additional delays caused by the complexity of the request. Andrews, 183 Wn. App. at 647. On May 3, the requester filed a lawsuit alleging that the WSP violated the PRA by failing to respond to the request by their estimated response date. Andrews, 183 Wn. App. at **[*940]** 647-48. On May 9, the WSP responded to the requester explaining the complexity of the request and provided a new estimated time for responding to the request. **[**1011]** Andrews, 183 Wn. App. at 648. On May 25, the WSP fully responded to the requester's public records request. Andrews, 183 Wn. App. at 649. The requester continued to argue that he was entitled to penalties for the entire period of time between the WSP's estimated response date and the date the WSP ultimately responded to the request. Andrews, 183 Wn. App. at 649-50.

¶32 The court disagreed and declined to impose a "mechanically **[***19]** strict finding of a PRA violation whenever timelines are missed." Andrews, 183 Wn. App. at 653. Instead, the court held that the PRA did not require an agency to comply with its own self-imposed deadlines as long as the agency was acting diligently in responding to the request in a reasonable and thorough manner. Andrews, 183 Wn. App. at 653-54. Because the WSP acted diligently in its attempts to respond to the PRA request, and the WSP's "thoroughness of response [was] not an issue," the court affirmed the trial court's order granting summary judgment in favor of the WSP. Andrews, 183 Wn. App. at 653-54.

¶33 Here, the Auditor consistently made every effort to fully comply with Hobbs' public records request and voluntarily cured each of Hobbs' alleged violations. The Auditor produced new exemption codes and explanations, produced updated copies of certain redacted pages, re-produced 17 copies of the letter closing the whistle-blower investigation in order to address Hobbs' concern regarding the metadata, and consulted with the statewide technology audit team manager to develop a method of providing the documents in a format that Hobbs had requested. And Hobbs does not dispute that by the time of the final hearing, all of the issues he raised regarding the Auditor's response **[***20]** had been cured. **HN10** When an agency diligently makes every reasonable effort to comply with a requester's public records request, **[*941]** and the agency has fully remedied any alleged violation of the PRA at the time the requester has a cause of

[11] 183 Wn. App. 644, 334 P.3d 94 (2014).

action (i.e., when the agency has taken final action and denied the requested records), there is no violation entitling the requester to penalties or fees.[12]

B. INITIAL RESPONSE LETTER

WA[7,8] [7, 8] ¶34 Hobbs asserts that the Auditor violated **[***21]** the PRA by failing to properly provide a prompt response to his public records request. Although the Auditor sent Hobbs a response letter within the statutory five-day response period and included an estimated date for completion of the first installment in response to Hobbs' public records request, Hobbs contends that this response was insufficient because it did not provide him with an estimated date for completing the Auditor's entire response to his public records request. Hobbs is incorrect. The Auditor's response complied with the statutory five-day response period; thus, the Auditor did not violate the PRA.

¶35 HN12 RCW 42.56.520 governs an agency's initial response to a PRA request and states, in relevant part:

> HN13 Within five business days of receiving a public record request, an agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives must respond by either (1) providing the record; (2) providing an internet address and link on the agency's web site to the specific records requested, except that if the requester notifies the agency that he or she cannot access the records through the internet, then the agency must provide copies of the record **[***22]** or allow the **[*942]** requester to view copies using an agency **[**1012]** computer; (3) *acknowledging that the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives has received the request and providing a reasonable estimate of the time the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives will require to respond to the request*; or (4) denying the public record request.

(Emphasis added.) In addition, HN14 RCW 42.56.080 allows an agency to produce records on a "partial or installment basis." Here, the Auditor informed Hobbs that it would be producing the records in installments. We must, therefore, determine whether RCW 42.56.520 requires an agency to respond to a public records request by providing a reasonable estimate of when the agency will be able to provide the *completed* response to the request, or whether it is sufficient for the initial response to include only a reasonable estimate of the time it will take the agency to produce the first installment of responsive records.

¶36 HN15 Under the PRA, there are two ways for an agency to "respond" to a public records request. The agency can (1) make the records available **[***23]** for inspection or copying or (2) respond by including an explanation of the exemption authorizing the agency to withhold the record. *See* Rental Hous. Ass'n, 165 Wn.2d at 535 (quoting RCW 42.56.210(1) and (3)). The plain language of RCW 42.56.520 requires that the agency provide a reasonable estimate of the time required to respond to the request. Here, the Auditor provided a reasonable estimate of the time required to respond to Hobbs' public records request; the Auditor stated it would provide the first installment of records by December 16. As noted, an agency can make the records available on an installment basis. RCW 42.56.080. Because the Auditor complied with the plain language of RCW 42.56.520, we hold that the superior court did not err in finding that the Auditor complied with the prompt response requirement of the PRA. **[*943]**

¶37 However, Hobbs asks us to read additional language into RCW 42.56.520. Specifically, he asks us to interpret RCW 42.56.520 as requiring the agency to provide an estimate of the reasonable amount of time needed to fully or completely respond to the request. HN16 When interpreting a statute, "we 'must not add words where the legislature has chosen not to include them.'" Lake v. Woodcreek Homeowners Ass'n, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010) (quoting Rest. Dev., Inc. v. Cananwill, Inc., 150 Wn.2d 674, 682, 80 P.3d 598 (2003)). Accordingly, we will not interpret HN17 RCW 42.56.520 to require agencies to provide an estimate of when it will fully **[***24]** respond to a public records request when the legislature has declined to

[12] We stress that this opinion should not be read to encourage requesters to remain silent and wait until final agency action to voice concerns regarding agency actions or inaction. HN11 The purpose of the PRA is to encourage open and transparent government by ensuring public access to government records. RCW 42.56.030. As a policy matter, the purpose of the PRA is best served by communication between agencies and requesters, not by playing "gotcha" with litigation. In cases such as this, where an agency is making every effort to cooperate with a requester to provide the requested records, there certainly cannot be any legitimate purpose served by initiating a lawsuit prior to the agency making a final decision regarding what documents it will and will not produce.

include such language in the statute.

C. Scope of Records Search

¶38 Finally, Hobbs argues that the scope of the Auditor's records search was unreasonable because (1) the investigator assigned to investigate the whistle-blower complaint did not search all of her electronic records and provided the employees responsible for responding to the request with paper copies of the files she kept; (2) it did not include "Outlook appointment records, the investigator's diary of the time she spent on the investigation, and the invoices that were sent to the DSHS on the basis of the diary entries"; and (3) the Auditor failed to search its disaster backup tapes. Br. of Appellant at 46. We disagree.

WA[9,10] [9, 10] ¶39 HN18 "'The adequacy of a [records] search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents.'" Forbes v. City of Gold Bar, 171 Wn. App. 857, 866, 288 P.3d 384 (2012) (quoting Neighborhood All. of Spokane County v. Spokane County, 172 Wn.2d 702, 720, 261 P.3d 119 (2011)), review denied, 177 Wn.2d 1002 (2013). Washington courts have adopted the federal courts' reasonableness standard as articulated by the Tenth Circuit Court of Appeals:

> **[*944]** "[T]he focal point of the judicial inquiry is the agency's search process, not the outcome of its search. The issue is *not* **[***25]** whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate[,] ... [which is determined under] **[**1013]** a standard of reasonableness, and is dependent upon the circumstances of the case. The reasonableness of an agency's search turns on the likelihood that it will yield the sought-after information, the existence of readily available alternatives, and the burden of employing those alternatives."

Forbes, 171 Wn. App. at 866 (alterations in original) (internal quotation marks omitted) (quoting Trentadue v. Fed. Bureau of Investigation, 572 F.3d 794, 797-98 (10th Cir. 2009)). HN19 At a minimum, a person seeking documents under the PRA must identify the documents with sufficient clarity to allow the agency to locate them. Hangartner v. City of Seattle, 151 Wn.2d 439, 447, 90 P.3d 26 (2004). Agencies are not required to be mind readers. Bonamy v. City of Seattle, 92 Wn. App. 403, 409, 960 P.2d 447 (1998).

[11] [11] ¶40 As an initial matter, Hobbs presents an incorrect characterization of the issue for our review. He points to specific pieces of the Auditor's records search (i.e., the search by one specific person) or to particular words in his request that he believes the Auditor did not adequately interpret. But HN20 we inquire into the scope of the agency's search as a whole and whether that search was reasonable, not whether the requester has presented alternatives that he believes would **[***26]** have more accurately produced the records he requested.

[12] [12] ¶41 Here, the Auditor assigned numerous people to conduct the search for relevant records in response to Hobbs' public records request, not just the investigator who had investigated the original whistle-blower complaint. The people assigned to respond to Hobbs' public records request identified numerous search terms that would reveal records related to the whistle-blower complaint. They used these terms to search numerous places where electronic **[*945]** documents were stored. The areas they searched included the Auditor's shared file system, e-mail files, and paper files. Over the course of responding to Hobbs' public records request, the Auditor identified thousands of pages of documents, including prior versions of documents, backup versions of documents, Outlook e-mails, documentation regarding meetings and appointments related to the investigation, and numerous other documents.

¶42 Hobbs complains that this search was not reasonable because the Auditor did not (1) search the backup tapes kept off-site specifically for disaster recovery; (2) uncover particular "documents," such as tabs from file folders; and (3) require the original whistle-blower **[***27]** case investigator to read Hobbs' entire public records request before copying her files for the employees gathering documents to compile a response. These alleged "failings" do not render the Auditor's records search unreasonable. Rather, the record shows that the Auditor performed a comprehensive search of its paper and electronic files using numerous terms meant to comprehensively identify records related to the whistleblower complaint and investigation that was the subject of Hobbs' public records request. Simply because Hobbs later identified additional documents he believed fell within the scope of his request does not mean that the Auditor's search was unreasonable. We hold that the Auditor's search for records to produce in response to Hobbs' public records request was reasonable, and Hobbs' PRA claim fails.

D. ATTORNEY FEES

[13] [13] ¶43 Hobbs also requests attorney fees. ***HN21*** *RAP 18.1* allows us to grant attorney fees if authorized by statute. ***HN22*** *RCW 42.56.550(4)* allows a person who prevails against an agency to be awarded costs and attorney fees. Here, Hobbs is not the prevailing party. Accordingly, he is not entitled to an award of attorney fees.
[*946]

¶44 We affirm the superior court's dismissal of Hobbs' PRA action with prejudice. **[***28]**

MAXA, J., and HUNT, J. PRO TEM., concur.

References

Washington Administrative Law Practice Manual

Annotated Revised Code of Washington by LexisNexis

End of Document

Judge COSTELLO
No Hearing Scheduled

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

ARTHUR WEST,

Petitioner,

v.

PORT OF TACOMA, a Washington State municipal entity,

Respondent.

No. 08-2-04312-1

RESPONDENT PORT'S SECOND SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS

[CLERKS' ACTION REQUIRED]

Respondent Port of Tacoma ("Port") makes the following Second Supplemental Designation of Clerk's Papers for transmission to the State of Washington Court of Appeals, Division II in Cause No. 48110-3-II.

The papers are identified by date of filing and title. No sub-numbering is used because the Pierce County Clerk's docket does not utilize sub-numbering.

DATE:	TITLE:	# of pages
01/14/2008	PLAINTIFF MOTION FOR ORDER TO SHOW CAUSE	2

DATED this 6th day of December, 2016.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ARTHUR WEST, Appellant, v. PORT OF TACOMA, Respondent.	No. 43004-5-II UNPUBLISHED OPINION

WORSWICK, C.J. — Arthur West appeals an order involuntarily dismissing his public records lawsuit against the Port of Tacoma. West argues that the trial court erred by (1) dismissing his lawsuit under both CR 41 and the trial court's inherent power to dismiss cases; (2) failing to conduct a show cause hearing or determine whether the Port violated the Public Records Act, chapter 42.56 RCW (PRA); and (3) appointing a special master to review the Port's claimed exemptions from disclosure. We agree that the trial court erred by dismissing West's case. We decline to consider his other arguments because they do not raise appealable issues. We also deny both parties' requests for attorney fees on appeal. Accordingly, we vacate the order of dismissal and remand for further proceedings.

FACTS

On December 4, 2007, Arthur West requested records from the Port of Tacoma. West requested documents including "[a]ll records and communications concerning the South Sound Logistics Center, from January 1, 2005 to present." Clerk's Papers (CP) at 14. The South Sound

Logistics Center was a proposed and subsequently abandoned joint venture of the Ports of Tacoma and Olympia, for which the Port of Tacoma purchased a 745-acre parcel of land.

The Port of Tacoma (hereinafter "the Port," unless otherwise specified) promptly gave West an expected date for the release of responsive records, but the Port repeatedly pushed back its expected release date. On January 14, 2008, West filed a pro se complaint alleging that the Port's actions violated the Public Records Act. The Port made its first batch of records available to West on January 28. West inspected this batch on January 29 and served the Port with his complaint on January 31.

The procedural history of West's case below is complicated and confusing. In 2008, West filed three motions for show cause orders. First, West's January 14 motion requested an order requiring the Port to appear and show cause "why the requested records should not be disclosed." CP at 5. The trial court granted this motion and ordered the Port to appear on February 12. The Port replied that it was responding in good faith; although it had not yet made all records available, it listed the steps it had taken and sought a reasonable time to claim exemptions and fulfill the request. After setting the show cause hearing over to March 28, the trial court reserved its ruling because the trial court could not yet determine whether the Port's claimed exemptions were justified.

Second, West's April 24 show cause motion sought to join the Port of Olympia as a defendant and order it "to appear to show cause why [it] should not be found in violation of the PRA, since many of the records recovered by the Port of Tacoma and now maintained in Pierce County are also Port of Olympia records which have been destroyed by the Port of Olympia." CP at 58. The trial court denied this motion on May 2.

Third, on May 15, West filed a "motion for reconsideration and for show cause," requesting, inter alia, (1) in camera review of the records responsive to West's request and (2) an order "finding [the Port] in noncompliance with the PRA for failing to disclose records or make exemptions in response to the original request prior to the filing of this suit, and due to [the Port's] continuing misrepresentations and manifest bad faith, [its] destruction of records, and the deliberate policy of concealment of records." CP at 71-72. The trial court denied West's motion to reconsider its earlier rulings.

By May 21—five months after West's original request—the Port had filed in the trial court copies of all responsive records, along with a log of its claimed exemptions. The 6,870 responsive records consisted of 19,923 pages contained in 51 volumes. The Port claimed that 175 records were entirely exempt from disclosure and another 97 records were partially exempt. West challenged all claimed exemptions.

On May 30, 2008, the trial court stated that, pursuant to CR 53.3, it would appoint a special master to review the responsive records and the claimed exemptions. West opposed the appointment, claiming that a special master would cause delays and, alternatively, that the court should appoint a public records expert and not an attorney with general experience in law.

On March 20, 2009, the trial court appointed the Honorable Terry Lukens, a retired superior court judge, as special master.[1] In a report filed July 24, 2009, the special master recommended that the trial court approve most of the Port's claimed exemptions. In response,

[1] The delay in the appointment was apparently caused by the trial judge falling ill for several months and the parties' dispute over the special master's appointment.

the Port filed a request to modify the special master's recommendation as to one rejected exemption. West opposed the Port's request.

In a September 16, 2009 letter, the special master stated that he considered his task complete and that the Port's request and West's opposition were for the trial court to consider. But for 16 months following submission of the special master's letter, West did not file any motions or other pleadings in the case.[2]

Instead, according to his own brief, West commenced "flailing around" by attempting to press his public records request in other fora. Br. of Appellant at 24. Specifically, West (1) asked the Pierce County prosecuting attorney to declare that the trial judge had forfeited his office by failing to issue a timely determination in this case; (2) filed a complaint in the superior court under a new cause number "for negligence, mandamus, quo warranto, and disclosure of public records," CP at 1235; and (3) filed an action in federal district court alleging numerous constitutional claims premised on his allegation that the Port and its counsel turned West's public records request into a "private criminal prosecution" against him, CP at 1243. Similarly, before the special master filed his report, West also (4) filed a bar grievance alleging that the Port's counsel was inadequately supervised by a partner in her law firm; and (5) wrote to state and federal prosecutors, including the United States attorney general, requesting a criminal investigation of a conspiracy to deprive West of his civil rights and right to inspect the Port's records.

[2] During 2010 the Port continued to file "various administrative items" including a notice of attorney change of address and a notice of counsel's unavailability. CP at 998.

On December 8, 2010, the trial court mailed West and the Port a letter notifying them of a "status conference" on January 7, 2011. CP at 603. The letter advised, "If no one appears . . . the Court will dismiss this matter on its own motion." CP at 603.

On January 7, 2011, the date of the status conference, the Port filed a motion to dismiss, which it framed as a "reply" to the trial court's letter. This motion argued that CR 41(b) required the trial court to dismiss West's claims for want of prosecution because West had not filed anything in the case docket for the previous 16 months.[3] In response, West claimed that the parties had been awaiting the trial court's ruling based on the special master's report. Despite the Port's failure to give West notice of its CR 41(b) motion to dismiss, the trial court stated it would "grant [the Port's] order"; however, the Port did not have a proposed order ready. Verbatim Report of Proceedings (VRP) (Jan. 7, 2011) at 5.

West immediately began a flurry of filings, several of which seemed to duplicate one another. On January 7, West filed a note for a hearing on presentation of a written order of dismissal; the trial court set this hearing over to January 25. The trial court's January 25 order of dismissal relied solely on CR 41(b)(1) and (2).

Also on January 7, West filed a handwritten notice of appeal seeking our Supreme Court's direct review of the order of dismissal "and [ ] orders." CP at 606 (omitting two illegible words, possibly "24 interlocutory"). Our Supreme Court considered this notice of appeal along with a second notice that West subsequently filed. Although a notice of appeal is premature if filed before entry of the written decision, West apparently overcame this barrier by filing the trial

[3] The Port simultaneously filed an additional motion to dismiss, also captioned as a "reply," asserting that dismissal was warranted because the Port complied with the Public Records Act. The trial court did not consider the merits of this motion.

court's written order of dismissal after its entry. *See* Letter from Supreme Court Deputy Clerk Susan Carlson to the parties and Pierce County Superior Court Clerk Kevin Stock (Jan. 11, 2011), and Letter from Supreme Court Deputy Clerk Susan Carlson to the parties (Feb. 17, 2011), *West v. Port of Tacoma*, No. 85510-2 (Wash.).

On January 19, West filed in the superior court a "note for trial, declaration, and objection to CR 41 dismissal." CP at 610. Although West noted this objection to be heard on January 28, the trial court set it over to March 4.

On February 1, West filed a "motion to vacate improper dismissal issued without notice," citing CR 59. CP at 630. The Port and the trial court treated it as a motion to reconsider the order of dismissal. Although West noted this motion to be heard on February 25, the trial court set this hearing over to March 18.

When the trial court convened the March 4 hearing on West's objection to the CR 41 dismissal, West did not appear. The trial court then entered an order denying West's motion to reconsider.[4] The order denying reconsideration based dismissal of West's suit on CR 41, and, for the first time, also based dismissal on the ground that West's "refusal to obey [a court] order was willful or deliberate." CP at 660 (alteration in original). But the trial court did not specify

[4] The record does not explain why the trial court denied West's motion to reconsider on March 4 instead of on March 18, the date on which it was noted for a hearing. West later claimed that (1) he believed the March 4 hearing had been set over to March 18 and (2) the trial court "deliberately held an ex parte hearing." CP at 672. But the trial court informed both parties of the March 4 hearing by letter dated January 21. Further, on March 2, the Port's counsel filed a proposed order denying West's motion for reconsideration; the proposed order was prepared for the trial court's consideration at the March 4 hearing. Although the record does not include a declaration of service accompanying the proposed order, the Port's counsel represented that "Mr. West has been served with [it]." VRP (Mar. 4, 2011) at 2. It also appears from the record that no hearing occurred on March 18.

the order that West willfully or deliberately disobeyed. The trial court further characterized its conclusions of law as supporting a "ruling to dismiss for want of prosecution." CP at 661.

On March 18, West filed a second notice of appeal, again seeking direct review in our Supreme Court. The notice of appeal identified (1) the order of dismissal, (2) the order denying West's motion to reconsider, and (3) "all interlocutory orders." CP at 662. The Supreme Court's clerk later transferred the case to this court because both West and the Port agreed to it. Letter from Supreme Court Deputy Clerk Susan Carlson to the parties (Dec. 15, 2011), *West*, No. 85510-2.

ANALYSIS

I. ORDER OF DISMISSAL

West argues that the trial court erroneously dismissed his suit because (1) it failed to give proper notice under CR 41 (b)(1) or (2), and (2) the trial court's inherent power cannot support the order of dismissal. In an apparent concession, the Port's response does not contend that the trial court properly relied on CR 41(b)(1) or (2); instead, the Port claims that the order of dismissal was a proper exercise of the trial court's inherent power. We agree with West that the order of dismissal was not properly based on CR 41(b)(1), CR 41(b)(2), or the trial court's inherent power.

A trial court may dismiss a case pursuant to a court rule or by exercising its inherent power to dismiss cases. *See Snohomish County v. Thorp Meats*, 110 Wn.2d 163, 166-67, 750 P.2d 1251 (1988). But a trial court may exercise its inherent power to dismiss a case "only when no court rule or statute governs the circumstances presented." *Thorp Meats*, 110 Wn.2d at 167.

A. *Dismissal under CR 41(b)(1) and (2)*

West argues that the order of dismissal for want of prosecution was improper under CR 41(b)(1) and CR 41(b)(2) because he did not receive sufficient notice. We agree.

Whether a trial court properly dismissed an action for want of prosecution is a question of law. *State ex rel. Heyes v. Superior Court*, 12 Wn.2d 430, 433, 121 P.2d 960 (1942). Likewise, the application of a court rule to a particular set of facts is a question of law reviewed de novo. *Wiley v. Rehak*, 143 Wn.2d 339, 343, 20 P.3d 404 (2001).

Each of CR 41(b)(1) and (2) provides an independent method of involuntary dismissal under distinct circumstances. *Wallace v. Evans*, 131 Wn.2d 572, 578, 934 P.2d 662 (1997). But under both provisions, involuntary dismissal is *mandatory* when the criteria for dismissal are met. *Thorp Meats*, 110 Wn.2d at 167; *Vaughn v. Chung*, 119 Wn.2d 273, 278, 830 P.2d 668 (1992).

1. *CR 41(b)(1)*

CR 41(b)(1) permits a trial court to dismiss a case on a *party's* motion when the plaintiff "neglects to note the action for trial or hearing within 1 year after any issue of law or fact has been joined," unless the moving party caused the delay. "Such motion to dismiss shall come on for hearing only after 10 days' notice to the adverse party." CR 41(b)(1).

Here, dismissal was clearly improper under CR 41(b)(1) because the Port did not give West 10 days' notice. Instead, the Port moved to dismiss the case on the same day that the motion was heard. Thus the order of dismissal was erroneous to the extent it was based on CR 41(b)(1).

2. *CR 41(b)(2)*

CR 41(b)(2) allows the trial court to dismiss dormant cases *on its own* motion. *Miller v. Patterson*, 45 Wn. App. 450, 455, 725 P.2d 1016 (1986). Dismissal under CR 41(b)(2) is appropriate when three elements are met: (1) the trial court's clerk mails the required notice to the parties, (2) there is no action of record in the case during the 12 months preceding the notice, and (3) within 30 days following the notice, there is no action of record and no showing of good cause for continuing the case. *Vaughn*, 119 Wn.2d at 278. In the required notice, "the clerk of the superior court shall notify the attorneys of record by mail that the court will dismiss the case for want of prosecution" unless action of record occurs or a showing of good cause is made within 30 days. CR 41(b)(2)(A).

As West asserts, the trial court's letter was a deficient notice for the purposes of CR 41(b)(2)(A). The letter required the parties to appear at a status conference and further advised that the trial court would dismiss the case on its own motion "[i]f no one appears." CP at 603. But unlike the required notice, the letter failed to inform the parties that the case would be dismissed after 30 days absent action of record or a showing of good cause.[5] CR 41(b)(2)(A). The letter did not meet the requirements of a notice under CR 41(b)(2)(A), and therefore CR 41(b)(2) also cannot support the order of dismissal.

[5] Because the notice's contents were insufficient, we do not address West's additional arguments that (1) the order of dismissal erroneously found that the trial court's letter provided *more than* 30 days notice to the parties of the status conference because *exactly* 30 days were provided and (2) West took action of record by appearing at the status conference and noting the matter for trial.

B. *Trial Court's Inherent Power To Dismiss Cases*

The Port proposed an additional order which it presented on March 4, when the trial court considered West's motion for reconsideration. The trial court's March 4 order contained all the findings of fact and conclusions of law stated in the January 25 order of dismissal, which was based solely on CR 41(b). In addition, the March 4 order contained one new finding of fact and seven new conclusions of law supporting dismissal as an exercise of the trial court's inherent power.[6]

The parties dispute whether the March 4 order *denying* West's motion for reconsideration could modify the rationale for dismissal by, for the first time, basing dismissal on the trial court's

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[6] The new finding of fact stated: "Petitioner West's failure to timely prosecute this PRA case was without justification or excuse." CP at 659. The new conclusions of law stated:

> 6. Dismissal is also an appropriate remedy where the record indicates that "(1) the party's refusal to obey [a court] order was willful or deliberate, (2) the party's actions substantially prejudiced the opponent [. . .] and (3) the trial court explicitly considered whether a lesser sanction would probably have sufficed." *See Rivers* [*v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 686, 41 P.3d 1175 (2002)].
> 7. A party's disregard of a court order without reasonable excuse or justification is deemed willful.
> 8. Petitioner West's failure to timely prosecute this PRA case was without justification or excuse, and was therefore willful.
> 9. This is a Public Records Act case, in which potentially, a "per day" penalty is at issue.
> 10. Imposition of a "per day" penalty is mandatory.
> 11. Each day of the Petitioner's delay adds to the risk of the Port incurring a per day penalty, which under existing law, the Port could not be excused from ***even on the basis that Plaintiff caused the delay***.
> 12. The Court's ruling to dismiss for want of prosecution recognizes and cures this prejudice, which no lesser sanction could do.

CP at 660-61.

inherent power. We assume without deciding that the trial court properly changed its rationale.[7] Even so, the trial court erred by exercising its inherent power to dismiss.

We review a trial court's order exercising its inherent power to dismiss a case for an abuse of discretion. *Stickney v. Port of Olympia*, 35 Wn.2d 239, 241, 212 P.2d 821 (1949). A trial court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). This standard is also violated when a trial court bases its decision on an erroneous view of the law.[8] *Mayer*, 156 Wn.2d at 684.

The trial court gave two reasons for exercising its inherent power to dismiss: (1) West's willful or deliberate refusal to obey a court order and (2) want of prosecution. Neither reason supports the dismissal of West's suit.

First, the trial court ruled that West's refusal to obey a court order was willful. But the trial court failed to identify any order that West violated. The trial court did not order West to prosecute his case, and our review of the record found no violation of any order. Therefore, to

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[7] Neither party cites authority addressing this precise issue.

[8] Citing *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992), the Port argues that we should not consider whether the trial court abused its discretion because West originally sought de novo review and addressed the abuse of discretion standard for the first time in his reply brief. We disagree. Although RAP 10.3(a)(6) provides in part, "The court ordinarily encourages a concise statement of the standard of review as to each issue," the Port cites no case in which a party waived an argument by failing to address the correct standard of review in its original brief. *See* Br. of Resp't at 36-37. Because West's original brief argues that the trial court erred by dismissing his claim to the extent it relied on its inherent power, West did not raise this issue for the first time in reply.

the extent the dismissal rests on West's refusal to obey a court order, the trial court abused its discretion by dismissing West's suit for an untenable reason.

Second, the trial court exercised its inherent authority to dismiss the case for want of prosecution. But CR 41(b)(1) limits a trial court's inherent power to dismiss actions for want of prosecution. *Wallace*, 131 Wn.2d at 575, 577. A trial court may dismiss for want of prosecution on the basis of its inherent power *only* where CR 41(b)(1) does not address the circumstances, i.e., where the plaintiff has engaged in "'unacceptable litigation practices other than mere inaction.'" *Bus. Servs. of Am. II, Inc. v. WaferTech LLC*, 174 Wn.2d 304, 308, 274 P.3d 1025 (2012) (quoting *Wallace*, 131 Wn.2d at 577). Examples of such unacceptable practices include "failures to appear, filing late briefs, and similarly egregious sorts of dilatory behavior." *Bus. Servs.*, 174 Wn.2d at 311.

Here, the trial court found that West engaged in only one dilatory behavior: inaction. But mere inaction is insufficient to support dismissal of an action on the basis of the trial court's inherent power. *Bus. Servs.*, 174 Wn.2d at 308, 311; *Wallace*, 131 Wn.2d at 577. By basing the order of dismissal on untenable reasons, the trial court abused its discretion. *See Mayer*, 156 Wn.2d at 684.

Arguing to the contrary, the Port claims that the record would support dismissal as an exercise of inherent power on the grounds that West was dilatory in two other respects: (1) West failed to appear at the March 4, 2011 hearing on his motion to reconsider the order of dismissal and (2) West demonstrated "[i]nexcusable and unprofessional dilatoriness" through a host of filings in this case and related matters he filed in other fora. Br. of Resp't at 33. This claim fails

because the trial court did not base the order of dismissal on these actions.[9] Because the trial court abused its discretion by dismissing West's case, we vacate both the order of dismissal and the order denying West's motion for reconsideration. We remand for further proceedings consistent with this opinion.

II. Show Cause Hearings and Determination of PRA Violations

West next argues that "the Trial Court refused to consider whether the Port had violated the [Public Records Act], even though the Port's violations were apparent at the times that Mr. West noted up the show cause hearings." Br. of Appellant at 38-39. By making this argument, West is attempting to advance his argument on the merits of his claim. Although neither party questions the propriety of this argument, we do not consider it because it challenges decisions that are neither (1) appealable as a matter of right nor (2) within the scope of West's appeal from the order of dismissal.

The only two methods for seeking review of a superior court's decision are appeal as a matter of right and discretionary review. RAP 2.1(a). RAP 2.2(a) lists the types of decisions that are appealable as a matter of right. *In re Dependency of Chubb*, 112 Wn.2d 719, 721, 773 P.2d 851 (1989). But a decision on a party's motion seeking a show cause hearing to determine the merits of the party's claim is not appealable as a matter of right under RAP 2.2(a).[10] *Meadow Park Garden Assocs. v. Canley*, 54 Wn. App. 371, 372, 773 P.2d 875 (1989).

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[9] The trial court never exercised its discretion by determining whether West's other actions were dilatory and, if so, whether they were so egregious that dismissal of the action was warranted as a sanction.

[10] When a decision is not appealable, it is reviewable solely according to the method for seeking discretionary review. *Chubb*, 112 Wn.2d at 721; *see* RAP 2.3. But West did not seek discretionary review.

Here, West's second notice of appeal sought review of the order of dismissal and "all interlocutory orders," apparently including the decisions on West's show cause motions. CP at 662. But a notice of appeal is not a proper method of seeking review of these decisions because they are not appealable as a matter of right. *Chubb*, 112 Wn.2d at 721; *Meadow Park*, 54 Wn. App. at 372.

In addition, West's challenge to the trial court's decisions on his show cause motions is outside the scope of his appeal from the order of dismissal.[11] Under RAP 2.4(b), the scope of our review of trial court decisions not designated in the notice of appeal includes decisions that (1) prejudicially affected the order designated in the notice of appeal and (2) occurred before we accepted review. A decision prejudicially affected an order if the order would not have happened but for the earlier decision. *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 380, 46 P.3d 789 (2002). Because the order of dismissal would have happened *regardless of* the trial court's decisions on West's show cause motions, the decisions on the show cause motions did not prejudicially affect the order of dismissal.

Thus the trial court's orders on West's show cause motions are *neither* appealable as a matter of right *nor* within the scope of West's appeal from the order of dismissal. *See* RAP 2.2, 2.4. Therefore, we decline to consider West's argument.

[11] The trial court's order of dismissal was appealable as a matter of right. RAP 2.2(a)(3); *Munden v. Hazelrigg*, 105 Wn.2d 39, 44, 711 P.2d 295 (1985).

III. Appointment of a Special Master

West further claims that the trial court erred by "appointing a special master to decide the ultimate issues in the case." Br. of Appellant at 47. We similarly decline to consider this claim because it also raises an issue that is not appealable.

Pursuant to CR 53.3, the trial court appointed the special master to review the records responsive to West's request and the Port's claimed exemptions from disclosure. CR 53.3 authorizes a trial court to appoint a special master "to adjudicate discovery disputes."

A pretrial discovery order is not appealable as a matter of right. *See* RAP 2.2(a). In addition, the trial court's order appointing a special master did not prejudicially affect the trial court's appealable order of dismissal for want of prosecution. *See* RAP 2.4; *Right-Price*, 146 Wn.2d at 380. Therefore we decline to consider West's claim that the trial court erred by appointing the special master.

ATTORNEY FEES ON APPEAL

Each party requests an award of attorney fees on appeal. A party may recover attorney fees on appeal if applicable law authorizes the award. RAP 18.1(a).

Citing RCW 42.56.550(4), West requests attorney fees "on appeal . . . and upon remand to the Trial Court." Br. of Appellant at 48. We deny the request.

RCW 42.56.550(4) provides in part:

> Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all

> costs, including reasonable attorney fees, incurred in connection with such legal action.[12]

A person prevails in a public records suit upon showing that, as a matter of law, the agency failed to disclose records upon request. *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 103, 117 P.3d 1117 (2005). Because the trial court dismissed West's suit without determining whether the Port failed to disclose records, at this stage RCW 42.56.550(4) provides no basis to award West attorney fees on appeal or upon remand. We deny West's attorney fee request.

Citing RCW 4.84.185 and RAP 18.9, the Port contends that it is entitled to reasonable attorney fees for defending a frivolous appeal. We disagree. Under RCW 4.84.185, an action is frivolous if, considering the action in its entirety, it cannot be supported by any rational argument based in fact or law. *Dave Johnson Ins., Inc. v. Wright*, 167 Wn. App. 758, 785, 275 P.3d 339, *review denied*, 175 Wn.2d 1008 (2012). Under RAP 18.9, an appeal is frivolous if it is so devoid of merit that there exists no reasonable possibility of reversal. *In re Marriage of Healy*, 35 Wn. App. 402, 406, 667 P.2d 114 (1983). Because this action clearly is *not* frivolous under either standard, the Port's request fails. We decline both parties' requests for attorney fees.

[12] In 2011, the legislature amended RCW 42.56.550(4) to eliminate a minimum penalty for each day that an agency denied a person the right to inspect or copy a public record. LAWS OF 2011, ch. 273, § 1. The amendment does not affect this analysis.

Because the trial court erred by dismissing West's case, we vacate the order of dismissal and the order denying reconsideration. We remand for further proceedings consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, C.J.

We concur:

Hunt, J.

Penoyar, J.

50 S.Ct. 451
Supreme Court of the United States

BRINKERHOFF-FARIS TRUST & SAVINGS CO.
v.
HILL, County Treasurer.

No. 464. | Argued May 1, 1930. | Decided June 2, 1930.

On Certiorari to the Supreme Court of State of Missouri.

Suit by the Brinkerhoff-Faris Trust & Savings Company against Walter O. Hill, Treasurer of Henry County, Mo. Judgment for defendant was affirmed (19 S.W. (2d) 746), and plaintiff brings certiorari.

Reversed and remanded.

West Headnotes (11)

[1] Federal Courts
Review of state courts

Federal claim invoking jurisdiction of Supreme Court was timely made, though in state Supreme Court, where raised at first opportunity (Const. U. S. Amend. 14).

5 Cases that cite this headnote

[2] Taxation
Conditions precedent in general

Plaintiff suing to enjoin county treasurer from collecting part of taxes claimed to be excessive did not omit to comply with any existing condition precedent, where state did not provide administrative remedy. V.A.M.S. §§ 138.010–138.080.

21 Cases that cite this headnote

[3] Constitutional Law
Judicial review

Judgment denying relief in equity from discrimination in tax for failure to first seek administrative remedy deprives plaintiff of property without due process, where administrative remedy was never available. U.S.C.A.Const. Amend. 14.

24 Cases that cite this headnote

[4] Constitutional Law
Applicability to Governmental or Private Conduct; State Action

Federal guaranty of due process extends to state action through judicial as well as through legislative, executive, or administrative branch of government. U.S.C.A.Const. Amend. 14.

26 Cases that cite this headnote

[5] Federal Courts
Validity of state constitution or statutes

State courts have supreme power to interpret written and unwritten laws of state.

2 Cases that cite this headnote

[6] Federal Courts
Review of state courts

United States Supreme Court's power to review decisions of state courts is limited to decisions on federal questions.

3 Cases that cite this headnote

[7] Federal Courts
Particular Cases, Contexts, and Questions

That state court rendered erroneous decision on question of state law, or overruled principles established by previous decisions on which party relied, does not confer appellate jurisdiction on federal Supreme Court (Const. U. S. Amend. 14).

7 Cases that cite this headnote

[8] Federal Courts
Particular Cases, Contexts, and Questions

State court's opinion is not final on claim arising under federal Constitution.

5 Cases that cite this headnote

[9] Federal Courts

Validity of state constitution or statutes

State court held to have power to construe statute dealing with state tax commission and to re-examine and overrule former case construing such statute (Rev. St. Mo. 1919, ss 12828-12852).

8 Cases that cite this headnote

[10] Constitutional Law

Course and conduct of proceedings in general

State courts must accord parties due process in determining adjective and substantive law of state.

27 Cases that cite this headnote

[11] Taxation

Conditions precedent in general

Taxpayer's laches in seeking relief from discrimination based on failure to apply to state tax commission held insufficient alone to support judgment dismissing bill for injunction. Mo.St.Ann. §§ 9819–9859, pp. 7916–7936 (Repealed Laws 1945, p. 1805).

18 Cases that cite this headnote

Attorneys and Law Firms

****452** ***674** Mr. Roy W. Rucker, of Sedalia, Mo., for petitioner.

Mr. Lieutellus Cunningham, of Jefferson City, Mo., for respondent.

Opinion

Mr. Justice BRANDEIS delivered the opinion of the Court.

In 1928, the Brinkerhoff-Faris Trust & Savings Company, acting as trustee for its shareholders, brought this suit in a Missouri court against the treasurer of Henry county, Mo., to enjoin him from collecting or attempting to collect a certain part of the taxes assessed against them for the year 1927 on the shares of its stock; and, pending decision in this suit, to restrain the prosecution of an action already brought by him against the plaintiff for that purpose.

The bill alleged that the township assessor had intentionally and systematically discriminated against the shareholders by assessing bank stock at full value, while intentionally and systematically omitting to assess certain classes of property and assessing all other classes of property at 75 per cent. or less of their value. It asserted that, to the extent of 25 per cent., the assessments were void because such discrimination violated the equal protection clause of the Fourteenth Amendment. And it recited that the plaintiff had tendered, and was continuing to tender, payment of the 75 per cent. of the taxes assessed, which amount it conceded was due. As grounds for equity jurisdiction, the bill charged that relief could not be had at law, either by way of defense in the pending action brought by the treasurer or by paying the tax in full under protest and suing for a refund of 25 per cent. thereof; and that no administrative remedy for the relief ***675** sought was, or ever had been, provided by law either by appeal or otherwise to or from the county board of equalization or the state board of equalization.

The defendant's answer denied all the allegations of discrimination and further opposed relief in equity on the grounds that the plaintiff had not pursued remedies before the county or state board of equalization pursuant to articles 3 and 5 of chapter 119 of the Missouri Revised Statutes of 1919 (sections 12820-12827, 12853-12857), and that the plaintiff was guilty of laches in not so doing. The trial court refused the injunction and dismissed the bill, without opinion or findings of fact.

The Supreme Court of Missouri held, on appeal, that relief from the alleged discriminatory assessment could not be had in any suit at law; that his bill in equity was the appropriate and only remedy, unless relief could have been had by timely application to some administrative board; and that neither of the boards of equalization was charged with the power and duty to grant such relief. But, without passing definitely upon the question of discrimination, it concluded that if the plaintiff had 'at any time before the tax books were delivered to the collector, filed complaint with the

state tax commission, that body, in the proper exercise of its jurisdiction. would have granted a hearing, and would have heard evidence with respect to the valuations complained of, and, if the charges contained in the complaint had been found to be true, the valuations placed on its property would have been lowered, or that on other property raised, the property omitted from the assessment roll would have been placed thereon, and the discrimination complained of thereby removed. The remedy provided by statute is adequate, certain, and complete.' Compare First National Bank of Greeley v. Weld County, 264 U. S. 450, 44 S. Ct. 385, 68 L. Ed. 784. The court held, therefore, that, because plaintiff had this adequate ***676** legal remedy, it was not entitled to equitable relief, and because plaintiff had not complained to the tax commission, 'it was clearly guilty of laches in not so doing.' On these grounds, the Supreme Court affirmed the judgment of the trial court. 19 S.W.(2d) 746.

The powers and duties of the state tax commission are prescribed by article 4 of chapter 119 of the Revised Statutes of 1919 (sections 12828-12852). Six years before this suit was begun, those provisions had been construed by the Supreme Court of Missouri in Laclede Land & Improvement Co. v. State Tax Commission, 295 Mo. 298, 243 S. W. 887. There, the court had been required to determine whether the commission had power to grant relief of the character here sought. The commission had refused, on the ground of lack of power, an application for relief from discrimination similar to that here alleged. The Laclede Company petitioned for a mandamus to compel the commission to hear its complaint. The Supreme Court denied the petition, saying that it was 'preposterous' and 'unthinkable' that the statute conferred such power on the commission; and that if the statute were thus construed, it would violate section 10 of article 10 of the Constitution of Missouri. That decision was thereafter consistently acted upon by the commission; and it was followed by the Supreme Court itself in later cases. [1]

****453** ***677** No one doubted the authority of the Laclede Case until it was expressly overruled in the case at bar. [2] While the defendant's answer asserted that the plaintiff had not availed itself of the administrative remedies under articles 3 and 5 of chapter 119 by application to the boards of equalization and was guilty of laches in not so doing (contentions which the state court held to be unsound), the answer significantly omitted any contention that there had been a remedy by application to the state tax commission, whose powers are dealt with in the intervening article 4. The possibility of relief before the tax commission was not suggested by any one in the entire litigation until the Supreme Court filed its opinion on June 29, 1929. Then it was too late for the plaintiff to avail itself of the newly found remedy. For, under that decision, the application to the tax commission could not be made after the tax books were delivered to the collector; and this had been done about October 1, 1927.

[1] The plaintiff seasonably filed a petition for a rehearing in which it recited the above facts and asserted, in addition to its claims on the merits, that, in applying the new construction of article 4 of chapter 119 to the case at bar, and in refusing relief because of the newly found powers of the commission, the court transgressed the due ***678** process clause of the Fourteenth Amendment. The additional federal claim thus made was timely, since it was raised at the first opportunity. Missouri ex rel. Missouri Ins. Co. v. Gehner, 281 U. S. 313, 50 S. Ct. 326, 74 L. Ed. —. The petition was denied without opinion. This court granted certiorari. 280 U. S. 550, 50 S. Ct. 152, 74 L. Ed. —. We are of opinion that the judgment of the Supreme Court of Missouri must be reversed, because it has denied to the plaintiff 'due process of law'-using that term in its primary sense of an opportunity to be heard and to defend its substantive right.

[2] **[3]** First. It is plain that the practical effect of the judgment of the Missouri court is to deprive the plaintiff of property without affording it at any time an opportunity to be heard in its defense. The plaintiff asserted an invasion of its substantive right under the federal Constitution to equality of treatment. Greene v. Louisville & Interurban R. R. Co., 244 U. S. 499, 37 S. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88; Sioux City Bridge Co. v. Dakota County, 260 U. S. 441, 43 S. Ct. 190, 67 L. Ed. 340, 28 A. L. R. 979. If the allegations of the complaint could be established, the federal Constitution conferred upon the plaintiff the right to have the assessments abated by 25 per cent. In order to protect its property from being seized in payment of the part of the tax alleged to be unlawful, the plaintiff invoked the appropriate judicial remedy provided by the state. Second Employers' Liability Cases, 223 U. S. 1, 55-57, 32 S. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44.

Under the settled law of the state, that remedy was the only one available. That a bill in equity is appropriate and that the court has power to grant relief, even under the new construction of the statute dealing with the tax commission, is not questioned. [3] And it is held by the state court in this case that no other judicial remedy is open to the plaintiff and that no administrative ***679** remedy, other than that before

the state tax commission, has been provided. But, after the decision in the Laclede Case, it would have been entirely futile for the plaintiff to apply to the commission. That body had persistently refused to entertain such applications; and the Supreme Court of the state had supported it in its refusal. Thus, until June 29, 1929, when the opinion in the case at bar was delivered, the tax commission could not, because of the rule of the Laclede Case, grant the relief to which the plaintiff was entitled on the facts alleged. After June 29, 1929, the commission could not grant such relief to this plaintiff because, under the decision of the court in this case, the time in which the commission could act had long expired. Obviously, therefore, at no time did the state provide to the plaintiff an administrative remedy against the alleged illegal tax; and in invoking the appropriate judicial remedy, the plaintiff did not omit to comply with any existing condition precedent. Montana National Bank v. Yellowstone County, 276 U. S. 499, 505, 48 S. Ct. 331, 72 L. Ed. 673.

If the judgment is permitted to stand, deprivation of plaintiff's property is accomplished without its ever having had an opportunity to defend against the exaction. The state court refused to hear the plaintiff's complaint and denied it relief, not because of lack ****454** of power or because of any demerit in the complaint, but because, assuming power and merit, the plaintiff did not first seek an administrative remedy which, in fact was never available and which is not now open to it. Thus, by denying to it the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property.

[4] **[5]** **[6]** **[7]** **[8]** **[9]** **[10]** Second. If the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the Fourteenth Amendment ***680** would be obvious. Ettor v. Tacoma, 228 U. S. 148, 33 S. Ct. 428, 57 L. Ed. 773.[4] The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid (First National Bank of Greeley v. Weld County, 264 U. S. 450, 44 S. Ct. 385, 68 L. Ed. 784) state statute. The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government.[5]

It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that this court's power to review decisions of state courts is limited to their decisions on federal questions;[6] and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this court.[7]

***681** But our decision in the case at bar is not based on the ground that there has been a retrospective denial of the existence of any right or a retroactive change in the law of remedies. We are not now concerned with the rights of the plaintiff on the merits, although it may be observed that the plaintiff's claim is one arising under the federal Constitution and, consequently, one on which the opinion of the state court is not final; or with the accuracy of the state court's construction of the statute in either the Laclede Case or in the case at bar. Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense-whether it has had an opportunity to present its case and be heard in its support. Undoubtedly, the state court had the power to construe the statute dealing with the state tax commission; and to re-examine and overrule the Laclede Case. Neither of these matters raises a federal question; neither is subject to our review.[8] But, ***682** while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real ****455** opportunity to protect it.[9] Compare Postal Telegraph Cable Co. v. Newport, 247 U. S. 464, 475, 476, 38 S. Ct. 566, 62 L. Ed. 1215.

[11] Third. The court's finding of laches was predicated entirely on the plaintiff's failure to apply to the state tax commission. In view of what we have said, this ground is not sufficient independently to support the judgment. And, as the Supreme Court of Missouri did not decide whether the allegations of the plaintiff's bill were sustained by the proof, we do not inquire into the merits of the plaintiff's claim under the equal protection clause. The judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice McREYNOLDS did not hear the argument and took no part in the decision of this case.

All Citations

281 U.S. 673, 50 S.Ct. 451 (Mem), 74 L.Ed. 1107

Footnotes

1 In Boonville National Bank v. Schlotzhauer, 317 Mo. 1298, 298 S. W. 732, 55 A. L. R. 489, where the taxpayer was represented by the same counsel who represent the plaintiff here, relief was sought by bill in equity from like discrimination, without prior application to the state tax commission. The Supreme Court of Missouri was required to decide whether the taxpayer had invoked the appropriate remedy; and it held, in an elaborate opinion which did not mention the tax commission, that the remedy pursued was the appropriate one and that the taxpayer was entitled to relief thereby, if the facts alleged were proved. See also Jefferson City Bridge & Transit Co. v. Blaser, 318 Mo. 373, 300 S. W. 778; Columbia Terminals Co. v. Koeln, 319 Mo. 445, 3 S.W.(2d) 1021; State v. Baker, 320 Mo. 1146, 9 S.W.(2d) 589, 592, 593; State v. Dirckx (Mo. Sup.) 11 S.W.(2d) 38.

2 The reason which prompted the Supreme Court to re-examine and overrule the Laclede Case is thus stated in its opinion: It is doubtful whether the evidence in this case warrants a finding that the local assessor intentionally and systematically undervalued real estate and personal property listed with him, other than bank stock; but there can be no question but that his failure to assess sucking animals and poultry was both intentional and pursuant to system. * * * If the owners of bank stock are entitled to an abatement of a portion of their taxes because other property was undervalued, it would appear on principle that all taxpayers of the state should be entirely relieved, so far as the taxes for 1927 are concerned, because the owners of poultry were not taxed at all. It seems necessary that we rechart our course.' 19 S.W.(2d) 746, 749.

3 Equitable relief was denied solely on the equitable doctrines that the plaintiff had an adequate legal remedy by application to the Commission and was guilty of laches in not pursuing it.

4 Compare Turner v. New York, 168 U. S. 90, 94, 18 S. Ct. 38, 42 L. Ed. 392; Saranac Land & Timber Co. v. Comptroller, 177 U. S. 318, 325, 20 S. Ct. 642, 44 L. Ed. 786; Crane v. Hahlo, 258 U. S. 142, 147, 42 S. Ct. 214, 66 L. Ed. 514; Atchafalaya Land Co. v. F. B. Williams Cypress Co., 258 U. S. 190, 197, 42 S. Ct. 284, 66 L. Ed. 559.

5 Ownbey v. Morgan, 256 U. S. 94, 111, 41 S. Ct. 433, 65 L. Ed. 837, 17 A. L. R. 873. Compare Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; Standard Oil Co. v. Missouri, 224 U. S. 270, 281, 32 S. Ct. 406, 56 L. Ed. 760, Ann. Cas. 1913D, 936; Frank v. Mangum, 237 U. S. 309, 326, 335, 35 S. Ct. 582, 59 L. Ed. 969; Moore v. Dempsey, 261 U. S. 86, 43 S. Ct. 265, 67 L. Ed. 543.

6 Kryger v. Wilson, 242 U. S. 171, 176, 37 S. Ct. 34, 61 L. Ed. 229; Mount St. Mary's Cemetery Ass'n v. Mullins, 248 U. S. 501, 503, 39 S. Ct. 173, 63 L. Ed. 383; Quong Ham Wah Co. v. Industrial Accident Comm., 255 U. S. 445, 448, 41 S. Ct. 373, 65 L. Ed. 723; Fox River Paper Co. v. Railroad Comm., 274 U. S. 651, 655, 47 S. Ct. 669, 71 L. Ed. 1279.

7 Central Land Co. v. Laidley, 159 U. S. 103, 112, 16 S. Ct. 80, 40 L. Ed. 91; Patterson v. Colorado, 205 U. S. 454, 461, 27 S. Ct. 556, 51 L. Ed. 879, 10 Ann. Cas. 689; Willoughby v. Chicago, 235 U. S. 45, 50, 35 S. Ct. 23, 59 L. Ed. 123; O'Neil v. Northern Colorado Irrigation Co., 242 U. S. 20, 26, 27, 37 S. Ct. 7, 61 L. Ed. 123; Dunbar v. City of New York, 251 U. S. 516, 519, 40 S. Ct. 250, 64 L. Ed. 384; Rooker v. Fidelity Trust Co., 261 U. S. 114, 118, 43 S. Ct. 288, 67 L. Ed. 556; Tidal Oil Co. v. Flanagan, 263 U. S. 444, 450, 44 S. Ct. 197, 68 L. Ed. 382; American Railway Express Co. v. Kentucky, 273 U. S. 269, 273, 47 S. Ct. 353, 71 L. Ed. 639. For 'a long line of decisions' holding 'that the provision of section 10, article 1, of the Federal Constitution, protecting the obligation of contracts against state action, is directed only against impairment by legislation and not by judgments of courts,' see Tidal Oil Co. v. Flanagan, 263 U. S. 444, 451, note 1, 44 S. Ct. 197, 68 L. Ed. 382. Likewise, with reference to ex post facto laws. Kring v. Missouri, 107 U. S. 221, 227, 2 S. Ct. 443, 27 L. Ed. 506; Ross v. Oregon, 227 U. S. 150, 161, 33 S. Ct. 220, 57 L. Ed. 457; Frank v. Mangum, 237 U. S. 309, 344, 35 S. Ct. 582, 59 L. Ed. 969.

8 The process of trial and error, of change of decision in order to conform with changing ideas and conditions, is traditional with courts administering the common law. Since it is for the state courts to interpret and declare the law of the State, it is for them to correct their errors and declare what the law has been as well as what it is. State courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of the earlier decisions. The doctrine of Gelpcke v. Dubuque, 1 Wall. 175, 17 L. Ed. 520, and Butz v. Muscatine, 8 Wall. 575, 19 L. Ed. 490, like that of Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865, is, if applied at all, confined strictly to cases arising in the federal courts. Fleming v. Fleming, 264 U. S. 29, 31, 44 S. Ct. 246, 68 L. Ed. 547; Tidal Oil Co. v. Flanagan, 263 U. S. 444, 451, 44 S. Ct. 197, 68 L. Ed. 382; Moore-Mansfield Const. Co. v. Electrical

Installation Co., 234 U. S. 619, 624-626, 34 S. Ct. 941, 58 L. Ed. 1503; Bacon v. Texas, 163 U. S. 207, 220-224, 16 S. Ct. 1023, 41 L. Ed. 132; Central Land Co. v. Laidley, 159 U. S. 103, 111, 112, 16 S. Ct. 80, 40 L. Ed. 91.

9 Had there been no previous construction of the statute by the highest court, the plaintiff would, of course, have had to assume the risk that the ultimate interpretation by the highest court might differ from its own. Likewise, if the administrative remedy were still available to the plaintiff, there would be no denial of due process in that regard.

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